CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF MISSOURI,

JULY TERM, 1872, AT JEFFERSON CITY.

BENJAMIN MILLER, Respondent, *v.* JOHN C. McCOY, Appellant.

1. *Judgment — Appearance of parties.*—The record of a judgment or decree which recites that both parties appeared to the suit by their counsel is *quoad hoc* properly admissible in evidence. It certainly cannot be attacked collaterally.
2. Allegata *and* probata — *Consideration — Money — Lands.* — Although the consideration named in a deed sued on is money, evidence is proper showing it to have been in fact lands given in exchange and of the value named.

Appeal from Kansas City Court of Common Pleas.

Karnes and *Ess*, for appellant, cited Smith v. Ross, 7 Mo. 465; Murphy v. Williams, 1 Ark. 376; Woodford *et al.* v. Howell, 2 Ark. 1; Ferguson v. Ross, 5 Ark. 517; Kimball v. Merrick, 20 Ark. 12; Eaton & Betterton v. Pennywit, 25 Ark. 144.

C. H. Thornton, for respondent, cited Lindell v. Bank, 4 Mo. 228, reaffirmed in Rutger v. Bank, 4 Mo. 315; Griffin & Kinote v. Samuels, 6 Mo. 51; Weber v. Schmeisser, 7 Mo. 600,

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reaffirmed in Ramsey v. Goodfellow, 7 Mo. 594; Latrielle v. Dorleque, 35 Mo. 233; Baker & Dalton v. Lusk, 16 Mo. 111; Landes v. Perkins, 12 Mo. 254; Landes v. Brant, 10 How. 359, 371; Bernecker v Miller, 44 Mo. 111; Childs v. Shannon, 16 Mo. 336; Chouteau v. Nuckolls, 20 Mo. 445; Cooper v. Reynolds, 10 Wall. 308; Woods, Christy & Co. v. Mosier, 22 Mo. 335; Samuels v. Shelton, 48 Mo. 450.

ADAMS, Judge, delivered the opinion of the court.

This was an action brought by the plaintiff, as assignee of Charles H. Thornton, on the covenants in a deed from the defendant to Thornton for certain real estate in Kansas City. The consideration mentioned in the deed was $2,500, and the breach alleged was eviction by superior title. The answer denied all the allegations of the petition, but set up no counter-claim or other defense.

The plaintiff, to maintain his case, introduced the record of proceedings had to enforce a prior vendor's lien against the property which resulted in a judgment and sale of the property, and showed that the purchaser took possession under this alleged paramount title. There was some defect in the service of notice in that case on some of the parties, but the entry of judgment shows that all the parties appeared by their attorneys, and submitted the case for trial, etc.

The proof showed that, although the consideration is mentioned as money in the deed sued on, it really was not money, but lands in the State of Kansas, rated by the parties at $2,500. Proof was introduced to show the value of the Kansas lands, and the defendant offered to prove by parol that the title to the Kansas lands were defective, that they were Indian lands, etc. This proof was rejected by the court. The jury found a verdict for the amount of the purchase-money and interest.

1. The record of the foreclosure of the vendor's lien was properly admitted. The recitals of the appearance of the parties is conclusive, at least in a collateral proceeding. Whatever may be the rulings of other courts, it is well settled in this State that such an appearance is sufficient to warrant a personal judgment

against the defendants. (Lindell v. Bank, 4 Mo. 228; Rutger v. Bank, 4 Mo. 315; Griffin & Kinote v. Samuels, 6 Mo. 51; Weber v. Schmeisser, 7 Mo. 600; Latrielle v. Dorleque, 35 Mo. 233; Landes v. Perkins, 12 Mo. 254.)

2. The evidence to prove the value of the Kansas lands was admissible for the purpose of showing that the real consideration was of the amount stated in the deed. But the title to these lands was not in controversy. The defendant had not set up any counter-claim for breach of the covenants in his deed, and therefore any evidence on that subject was foreign to the issues and properly excluded. On the whole record, I think the judgment was for the right party.

Judgment affirmed. The other judges concur.

JOHN W. WADDELL *et al.*, Respondents, *v.* DAVID WILLIAMS, Appellant.

1. *Land titles — Sheriffs — Justice's transcript.*— The sale of real estate upon an execution issued upon a justice's transcript filed in the Circuit Court, passes a perfect title.
2. *Practice, civil — Evidence, documentary.*— The rule is that controverted facts, especially when the evidence is contradictory, will be considered in actions triable by jury as correctly found in the trial court. But when documents or records are submitted in evidence their legal effect is a matter of law.

ON MOTION FOR REHEARING.

1. *Sheriff's sale — Justice's transcript — Execution — Validity of purchase — Constable's return — Purchase in trust.*— In a suit for land claimed under sale on execution issued from the Circuit Court on a justice's transcript filed therein, *held:*

1st. That the failure of the record to show affirmatively that the execution from the justice's court was issued to a constable of the township where the defendant resided (Wagn. Stat. 839, § 14), will not invalidate the title held under the sale in a collateral proceeding. For the purpose of any such proceeding the title is valid, and parol evidence therein to show that at the time of the issue of the justice's execution and the constable's return, defendant in the execution lived in another township, is improper.

2d. It is not essential to the validity of the execution issued from the Circuit Court, or the sale under it, that the transcript embrace a copy of the execution by the justice and the *nulla bona* return by the constable, where the sheriff's deed recites the fact of such issue and return.

3d. The sheriff's deed need not show that the justice's execution was issued to a constable of the township where the execution-defendant resided.

4th. The title derived from the sale is not invalidated by the fact that the purchase thereat, in its legal operation, resulted in a trust, where the property has not been charged with the trust by proper proceedings. Such trust must be ascertained and declared in equity before it can attach.

Appeal from Lafayette Court of Common Pleas.

Ryland & Son, for appellant.

The only question before this court is, has the defendant saved enough upon the record to ask the interposition of this court? The facts are, beyond doubt, for the defendant. We contend that he has. (Scott v. Brockway, 7 Mo. 61; Bauer v. Bauer, 40 Mo. 61; Morris v. Barnes, 35 Mo. 412; Bransteter v. Rives, 34 Mo. 318–321.) Defendant's motion for a new trial brought this matter properly before the court.

The evidence in this case mainly consists of deeds and other documents, and it was the duty of the court, as a matter of law, to construe them properly. (Fagin v. Connoly, 25 Mo. 94.) No declarations of law were necessary to call the attention of the court to the proper construction of the deeds.

The filing of the transcript of the judgment of Justice Currie in the office of the clerk of the Circuit Court of Lafayette county, made it the judgment of the Circuit Court from the date of the filing of it; it was a lien on the real estate of the defendant, against whom it was rendered, and the execution on said judgment issued by the clerk, and sale by the sheriff of defendant Dickson's real estate passed the title of the real estate to the purchaser thereof under the sheriff's deed.

The clerk of Lafayette Circuit Court had the power and authority to issue the execution on the transcript, and his execution was properly issued. (See Murray v. Laften *et al.*, 15 Mo. 621; Franse v. Owens, 25 Mo. 329; Burke v. Miller, 46 Mo. 260; Dillon v. Rash, 27 Mo. 243; Gray v. Payne, 43 Mo. 205; Norton, Guardian *et al.*, v. Quimby, 45 Mo. 389; Rubey v. Hann. & St. Jo. R.R. Co., 39 Mo. 480.)

H. C. Wallace, for respondents.

I. This court will not disturb the finding below, nor reverse the judgment of the lower court, in such a case as this. (Taylor v. Russell, 8 Mo. 701; Little v. Nelson, 8 Mo. 709; Fugate v. Muir, 9 Mo. 355; Von Phul v. City of St. Louis, 9 Mo. 49; Vaughn v. Bank of Missouri, 9 Mo. 379; Polk v. The State, 4 Mo. 549.)

If it does not appear from the record upon what ground the court below, sitting as a jury, based its decision, if there be any evidence on which its finding could be predicated, it will not be disturbed. (McEvoy, to use, etc., v. Lane *et al.*, 8 Mo. 47, 48; Wilson v. North Mo. R.R. Co., 46 Mo. 36.)

II. Where matters of fact and of law are submitted to a court sitting as a jury, the parties must separate the matters of law from the facts, and have the opinion of the court on the points of law, so that it can be seen on what ground the court decided the case, before the exceptions can be taken to the finding of the court below; and unless this is done, this court will not disturb the finding or judgment below. (Taylor v. Russell, 8 Mo. 701–2; Little *et al.* v. Nelson *et al.*, 8 Mo. 709–10; Polk v. The State, 10 Mo. 549.)

Bliss, Judge, delivered the opinion of the court.

The plaintiffs bring ejectment, and derive title from one Dickson, through a mortgage executed November 18, 1863, and a sheriff's deed to them of October 4, 1869, given upon sale under a foreclosure of the mortgage.

Defendant also derives title from Dickson, through a sheriff's sale upon execution against him. The judgment satisfied by the execution was originally recovered before a justice of the peace in July, 1862; a transcript was filed in the Circuit Court on the 2d of February, 1863. An execution directed to a constable having been returned *nulla bona*, one was issued to the sheriff on the first of October, 1863, under which the land was sold and deeded by the sheriff, and through subsequent sales it finally came into the hands of the defendant.

The cause was submitted to the court, which found for the plaintiff and gave him judgment. No declarations of law were asked, but the defendant asked for a new trial, mainly upon the ground that the finding was against the law and the evidence; and the motion being overruled, he appealed.

The finding and judgment of the court were erroneous. The lien of the judgment against Dickson dates from the 2d of February, 1863, and the sale under the execution issued upon it passed a perfect title. (Gen. Stat. 1865, ch. 183, §§ 13, 14; Wagn. Stat. 839; Bunding v. Miller, 10 Mo. 445.) There is no evidence to invalidate this sale, and the proceedings upon which it was founded were regular, and quite as formal as we usually find them.

Counsel claim that under our practice we should not look into the evidence, but that upon the facts the finding of the trial court should be taken as correct. The rule is that controverted facts, especially when the evidence is contradictory, will be considered, in actions triable by jury, as correctly found in the trial court. But when documents or records are submitted in evidence, their legal effect is matter of law. The legal effect of the filing and record in the Circuit Court of the judgment against Dickson, with the subsequent proceedings thereon, was to pass the title out of him into the defendant's grantors; and a finding that the title still remained in Dickson and passed to the plaintiffs, through a mortgage executed after the date of the judgment lien, is contrary to law and evidence. The evidence of title is on paper, and the court committed error in misjudging its legal effect.

The consideration expressed in defendant's deed shows that he purchased at a high price. The land is doubtless valuable, yet the plaintiffs bid it in for $5, being notified at the time that the title was in others. They are entitled to no special consideration, and the judgment will be reversed and judgment entered against them in this court. The other judges concur.

MOTION FOR REHEARING.

Alexander & Childs, with *Wallace & Mitchell*, for respondents.

To attempt to review this case would be to express the opinion of the appellate court simply upon the weight of evidence. And in the majority of these cases, where this doctrine has been so forcibly laid down by this court, the trial was by the lower court, sitting as a jury, and the evidence documentary. The decision in this cause is in direct conflict with and a contradiction of the opinion of this court, delivered by Judge Wagner, in the case of Weilandy *et al.* v. Lemuel, 47 Mo. 322. (See also Taylor v. Russell, 8 Mo. 701; Little v. Nelson, 8 Mo. 709; Kurlbaum v. Roepke, 27 Mo. 161; Easly v. Elliott, 43 Mo. 289; McEvoy v. Lane, 9 Mo. 48; Wilson v. North Mo. R.R. Co., 46 Mo. 36.)

The decision in this case is contrary to the terms of an express statute. Section 17 of article VII, chapter 90, p. 961, R. C. 1855, provides that no execution shall be sued out of the court where the transcript is filed, if the defendant is a resident of the county, until an execution shall have been issued by the justice, directed to the constable of the township in which the defendant resides, and returned that the defendant had no goods and chattels whereof to levy the same. No pretense is made by appellant that this was done. The justice's docket and transcript shows the contrary. The execution under which the land was sold to appellant's grantor shows the contrary.

The sale of land under an execution is a sale *in invitum*, and if the power to sell does not exist no title passes. (See Thatcher v. Powell, 6 Wheat. 119.)

The decision in this cause, that the proceedings in enforcing the lien of the transcript, without a compliance with the law, "are quite as regular as we usually find them," and divested Dickson of his title to the land, in effect decides that the positive requirements of an express statute may be dispensed with, and that he was deprived of his title without observing the law of land, by the acts of ministerial officers, which is in conflict with

the former decisions of this court. (Coonce v. Munday, 3 Mo. 373; Burk *et al.* v. Flournoy, 4 Mo. 116; Carr v. Youse, 39 Mo. 346; *id.* 43 Mo. 28; Tanner v. Stine, 18 Mo. 580.)

Appellant's grantor was a co-mortgagee, under the foreclosure of which respondent purchased. He stood in the relation of a trustee of the mortgagor and his co-mortgagee. Whatever interest he acquired under the outstanding encumbrance inured to the benefit of the mortgagor and his co-mortgagee, and was held by him in trust for them, and could not be conveyed to him by the appellant. When he foreclosed the mortgage, respondents acquired this interest at the sale under the foreclosure. The appellant does not plead that he had no notice of this relationship, and the records affect him with it. (Price v. Evans' Heirs, 26 Mo. 30; 2 Sto. Eq. Jur. 1016; 1 Sto. Eq. Jur., § 307 *et seq.*)

Bliss, Judge, delivered the opinion of the court on motion for rehearing.

Plaintiffs desire rehearing for the reasons:

1. That former decisions are overruled in considering the evidence in an action at law. This point was made in argument and considered. We pass upon no disputed question of fact, but hold that the court erred as to the legal effect of undisputed facts. A formal declaration of law could not have made the error more apparent, and the trial court was only called upon to decide as to the effect of certain proceedings in passing title, and this is a question of law which we must review.

2. It is claimed that the decision overrules the statute and its settled construction. The defendant claims title through an execution sale upon a judgment recovered before a justice of the peace. Previous to the levy and sale by the sheriff and filing of the transcript in the Circuit Court, an execution had been issued to a constable of the county, who returned no goods, etc. The record does not show affirmatively that it was issued to a constable of the township where the defendant resided. This, it is claimed, is such an irregularity as rendered the subsequent proceedings void, and hence no title passed by the sheriff's sale after the

transcript was filed in the Circuit Court; and Coonce v. Munday, 3 Mo. 373, and other cases are cited.

These cases show that the issuing of execution to a constable, and return, are necessary to give the Circuit Court and sheriff jurisdiction, and hence the fact can be inquired into collaterally. In the case under consideration the original writ was issued to a constable of Lexington township, and returned by him as served in that township. After the judgment was rendered, an execution was issued to a constable of the same name — doubtless the same person — who returns that he could find no goods, etc., in Lafayette county. Parol evidence was offered upon the trial to show that the execution-defendant lived in another township; and the question arises whether that fact can be inquired into collaterally.

The purchaser at sheriff's sale is bound to know that the execution is sustained by a judgment, and by such a judgment as still authorizes its issue. No execution can issue to a sheriff upon a justice's judgment unless a previous one has been issued to the proper constable and returned *nulla bona*, and a transcript has been filed. The purchaser then will examine the transcript and certificates, and may inspect the justice's records and files, and in doing so will not be likely to find anything to show the actual residence of the execution-defendant. Neither the summons (Wagn. Stat. 815, § 16) nor the execution (Wagn. Stat. 841, § 4) show such residence, and he will only see that the summons was served, the judgment rendered, and the execution properly issued and returned. He has a right to presume that the defendant lived within the justice's jurisdiction, and may safely purchase. If the proceedings have not been regular, those interested may attack them directly and show *aliunde* facts—as that the constable was not an officer of the township where the defendant resided — that should set aside the proceedings. But if the party supposed to be injured sleeps, strangers cannot step in. The purchaser saw enough to authorize the sheriff to sell. In other words, the latter had acquired jurisdiction upon the record, and the sale cannot be treated as void. In this collateral proceeding, the evidence that tended to show that the execution-defendant was

not residing in Lexington, but in another township, when the execution issued, should not have been considered; and such is the spirit of the decision in Murray v. Laften, 15 Mo. 621.

3. The only evidence of the execution and return was a minute in the transcript that one was issued, with a certified copy of the return, and it is therefore insisted that the subsequent execution issued to the sheriff was unauthorized and void. As intimated in Murray v. Laften, it would be well if a transcript of the justice's execution and return thereon were filed and recorded with the transcript of the judgment; and when so made it would furnish record evidence not to be collaterally contradicted. But this is not the only admissible evidence. The original execution, with the return, may be found, and the fact of its issue and return may be thus proved. In Carr v. Youse, 39 Mo. 346, the court held that a mere certificate of the justice that an execution had been issued and returned *nulla bona* was not sufficient, but if the record in the clerk's office does not contain the justice's execution and return, they may be proved by the record of the justice itself or a certified transcript of the same. The record then in the clerk's office seems to be defective in not containing a copy of the execution, as well as of its return, and no evidence of such execution was offered *aliunde*.

Did this omission in the trial below render the sheriff's deed a nullity? If it were necessary for the defendant, in order to sustain the deed, to go back of it and show the regularity of the proceedings upon which it was founded, then, under our decisions, he probably failed, inasmuch as he neither produced the original execution nor a transcript of it or of its record. I cannot but think our decisions have been rigid in this regard, and contrast with the liberality shown to sheriffs' sales under judgments in courts of record. The justice's execution constitutes no part of the title of the purchaser at the sale by the sheriff, but is a mere preliminary requirement before an execution can issue by the circuit clerk. It would be difficult and often impossible, after a lapse of years—so loosely do many of our local magistrates keep their papers—to find the originals; and as the law does not point out what, except the transcript of the judgment itself, shall

be filed and recorded, it might be well, in the interest of titles, to be less stringent as to proofs of this preliminary matter.

But the defendant did produce evidence made competent by statute, that the justice's execution was issued and return *nulla bona*. Section 14 of the article concerning justices' judgments (Wagn. Stat. 839) provides that a judgment of a justice of the peace, when the transcript is filed with the circuit clerk, shall be "carried into effect in the same manner and with like effect as judgments of Circuit Courts," etc. Executions are issued and sales are made the same as upon Circuit Court judgments, and the deed of the sheriff has the same legal effect. By section 54 of the act concerning executions (Wagn. Stat. 612), certain recitals are required to be made in the sheriff's deed, "which recitals shall be received as evidence of the facts therein stated." In McCormick v. Fitzmorris, 39 Mo. 24, this court held these recitals to be presumptive evidence of the facts recited. The sheriff's deed offered in evidence recited the facts that an execution was issued by the justice of the peace and that it was returned *nulla bona*, before the issue of the one upon which he made the sale.

It may be said that this recital is insufficient because it does not show that the justice's execution was issued to a constable of the township where the execution-defendant resided. The facts recited in the deed are taken from the execution placed in the sheriff's hands by the circuit clerk, and there is nothing upon the clerk's records to show the domicile of the execution-defendant. He could only see that the original summons was served in Lexington township by one of its constables, and that an execution was issued to and returned by the same constable. No paper would show the residence, only as it would be presumed from the fact that the service of the summons was in Lexington. Hence, if he stated such residence it would be from inference that the justice did his duty, and not from any facts which the record should furnish him. I cannot, then, consider such recital, or its correctness if made, as essential to the validity of the execution and sale under it.

4. It is also insisted that the defendant's original grantor, the one who purchased at the execution sale, was also mortgagee with

others, and that his purchase was in trust for all the mortgagees. Saying nothing upon the main proposition, does it follow that, without an ascertainment of the trust by a direct proceeding — a proceeding that shall, if the trust be found, find the sum paid and provide for its reimbursement — it so attaches to the property that no title can pass through the purchase? The trust, if one exists, is not by contract, but must be ascertained and declared in equity before it can attach. The present proceeding assumes that the plaintiffs have the legal title, when in fact such title passed to the defendant's grantor by the sale; and if the plaintiffs would charge the property with a trust, they must do it directly and by an appropriate proceeding. I find no points in the motion not before considered, although not commented upon in the original opinion.

The motion is overruled. The other judges concur.

CEDAR COUNTY, Respondent, *v.* A. W. JOHNSON *et al.*, Appellants.

1. *Counties — School funds — Bonds — Sureties — Construction of statute.* — Sections 1 and 2 of the statute relating to sureties (Wagn. Stat. 1302) do not apply to bonds given a county for the use of one of its townships, for school moneys; and it is not necessary, in order to hold sureties liable on such bonds, that suits should be brought against their principals within thirty days after notice given to the county to take that step. The term "person," as used in section 1, does not include counties, notwithstanding the provisions of the act on construction of statutes (Wagn. Stat. 887, § 4). Counties are not properly bodies corporate as contemplated by that section. Furthermore, counties are not the parties to bring suit, as they have no interest in the school funds. The fact that the bonds for the moneys loaned are made payable to the county gives it no right of action founded upon them.

Appeal from Cedar Circuit Court.

Chandler & Buller, for appellants.

The county, being a *quasi* corporation, is included in the general term "person" (Wagn. Stat. 1302, § 1) unless expressly excepted. (Dunklin County Court v. Dunklin County, 23 Mo. 449.)

The classes of bonds which are excepted from the operation of the first section are expressly enumerated in the fourth, which shows that the attention of the Legislature was directed to the object, and they did not see proper to include bonds given to counties, for the use of school townships, in those exceptions. (Ætna Ins. Co. v. Monaghan, 38 Mo. 432.)

J. P. Tracy, for respondent.

BLISS, Judge, delivered the opinion of the court.

The defendants were sued in attachment upon a bond given by them, Johnson being principal, and Blake and Sherrell as sureties, to plaintiff for the use of one of its school townships. One of the sureties sets up as a defense that he gave the judges of the County Court notice in writing to commence suit against the principal according to the statute, and that such suit was not commenced within thirty days thereafter. The court held it to be no defense to the action, and this is the error assigned.

Section 1 (Wagn. Stat. 1302) of the act provides that any person bound as surety, etc., may require, in writing, the person having the right of action forthwith to commence suit against the principal; and section 2 provides that if it be not so commenced within thirty days he shall be exonerated. Does this section apply to bonds due the State and county when the duty to bring suit devolves upon these officers? The affirmative is claimed by the counsel, so far as the bonds for school moneys are concerned, because they are not included in the exception made by section 4 of the act.

As to the bonds mentioned in section 4, the persons having the right of action are private persons or corporations, although the bonds may be given nominally to the State. It was necessary, then, to expressly exclude them from the operation of the first section. But bonds due the State or county for a public object are of a different character. No person has any special interest in this collection, and one who becomes a surety on such public bonds must hold himself ready to pay it if the principal fails. If he fears his insolvency he should pay the obligation and collect

it, if he can, of his principal; but he will not be discharged on account of the neglect of public officers.

Appellants claim that the phrase "person having such right of action" includes counties, because of the provision in section 4 of article II, upon the construction of statutes (Wagn. Stat. 887), that the term "party or person" shall include bodies corporate. They are not even municipal corporations, although called *quasi* corporations, because they have a semi-corporate organization. They are political divisions of the State, with certain officers upon whom the law imposes specific local duties in furtherance of the ends of government. I have never known a case in this State, or elsewhere, in which counties or townships have been included in the term "bodies corporate," or any term of like import. (See State v. County Court of St. Louis County, 34 Mo. 546; Barton County v. Walser, 47 Mo. 189.)

Even if the county could be called a body corporate, it has no interest in the school funds. They are not the property of the county and cannot be applied to any county use. The county is made the nominal payee of the bonds given for school moneys, but not for the use of the county, or any of its political or municipal subdivisions, but only for that of the people of the geographical townships organized into school districts; it is they, and not the county, that are severally interested in these bonds, and yet without the power to enforce their collection. The County Court, it is true, has the custody of these school funds, yet not for the county, but for the people of these several districts. The court is so far not a county agent, and the fact that the bonds for the moneys loaned are made payable to the county gives it no interest in them, or any "right of action" founded upon them. The person having the right of action is the individual or body corporate directly interested in the collection of the instrument, and who has the power of entering suit, and the statute does not refer to obligations given for public uses.

The other judges concurring, the judgment will be affirmed.

MARY C. AND WM. S. HUFF, Plaintiffs in Error, *v.* ICHABOD C. PRICE, Defendant in Error.

1. *Wife's estate, how parted with.*—A wife cannot part with her legal estate in lands in Missouri except by deed, in which her husband joins, executed and acknowledged according to the requirements of the statute.
2. *Husband and wife — Husband may sell his marital interest — Sale of land — Part performance — Equitable estoppel.*—A husband may bind himself personally by a contract for the sale of his interest in his wife's lands. And where he stands by and suffers his wife to make a contract for the sale of an estate, and with his knowledge and consent the purchaser enters into the possession under his contract, pays part of the purchase-money, and makes valuable and lasting improvements, he thereby adopts his wife's contract as his own, and will be afterwards estopped from suing for possession of the land without restoring to defendant the purchase-money he has paid out, with interest, and compensating him for the value of the improvements made by him on the land.

Error to Johnson Circuit Court.

R. Hicks, for plaintiffs in error.

A married woman has no capacity to contract for the sale of her real estate, or to convey it, except in the precise statutory mode. This is the rule at law, and equity follows the law. However meritorious the consideration, equity will not aid defects which are of the essence of the power, nor supply any circumstances for want of which the Legislature has declared the instrument void.

Elliott & Blodgett, for defendant in error.

I. A *feme covert*, as to her separate estate, can enter into contracts in the same manner as a *feme sole;* and her contracts, whether written or verbal, are equally binding (47 Mo. 512; Kimm v. Weippert, 46 Mo. 532; Tucker v. Gest, 46 Mo. 339; Schafroth v. Ambs, 46 Mo. 116; Bruner v. Wheaton, 46 Mo. 366; Miller v. Brown, 47 Mo. 512); and as the law now stands, property in the situation in which this is found must be regarded as the separate estate of the wife.

II. The defendant is entitled to a decree for specific performance, such as was rendered in the court below. (Despain v. Carter, 21 Mo. 331; Price v. Hart, 29 Mo. 171; Halsa v. Halsa, 8 Mo. 303; Hill. Vend. 145, ch. 9, § 6.)

ADAMS, Judge, delivered the opinion of the court.

This was an action of ejectment for the recovery of 280 acres of land in Johnson county. The suit was commenced in the Johnson Court of Common Pleas, and removed by change of venue to the Circuit Court of Johnson county.

The defendant in his answer admits that the plaintiffs are the legal owners of the land, but sets up as an equitable defense that he made a contract with them for the purchase of the land, paid part of the purchase-money down, and agreed to pay the balance at certain periods afterwards; that with the knowledge and consent of the plaintiffs he entered into possession of the land under this contract, and made valuable and lasting improvements thereon, regarding himself as the owner, and tendered the balance of the purchase-money in payment for the land, but the tender was refused.

The evidence showed that the plaintiffs were husband and wife, and that the fee-simple title to this land was vested in the wife as a legal estate, subject, of course, to the husband's life estate by way of curtesy. The contract for the sale of the land to defendant was made in the name of the wife. The facts in regard to possession under the contract, the payment of part of the purchase-money, the making of valuable and lasting improvements, and the tender of the balance of the purchase-money, were substantially proved as alleged. The court, upon the final hearing of the case, decreed the title to the defendant.

The law is well established that a married woman cannot part with her legal estate in lands in this State except by deed, in which her husband joins, executed and acknowledged in accordance with the requirements of the statute. Nor can she make a valid contract for the sale of her legal property. She may in equity make a binding contract in regard to lands held for her sole and separate use. It is not shown in this case that this land

was vested in her for her sole and separate use. Our statute concerning married women, which exempts the interest of the husband in her lands from attachment, etc., and which prevents him from selling such interest during coverture without her consent, manifested by joining in the deed, does not constitute her estate in such lands separate property so as to invest her with power to dispose of the same as separate property. The object of the statute was to prevent the husband's curtesy during coverture from being disposed of without the consent of the wife, and to secure this interest to their joint enjoyment. Although the wife cannot make a contract binding upon her except in regard to her separate property, the husband may bind himself personally by a contract for the sale of his interest in her lands. In this case the husband stood by and suffered his wife to make a contract for the sale of the entire estate in this land, and with his knowledge and consent the defendant entered into the possession under this contract, and made valuable and lasting improvements, having paid a part of the purchase-money, which went into his hands, or into the hands of his wife, which is the same thing, as her possession is his. Conceding that she is not bound by the contract, did he not by his conduct adopt this contract as his own? and will a court of equity suffer him to recover the possession of this land without placing the defendant *in statu quo*, by restoring to him the purchase-money he has paid, with interest, and compensating him for the value of the improvements made by him upon the land? The doctrine of equitable estoppel applies to this case so far as the husband is concerned. The decree is erroneous. Instead of vesting the title in fee in the defendant, the court must take an account of the amount of purchase-money paid by the defendant, with interest, and the value of the improvements made by him on the land, and require the husband to pay the defendant the amount of such account, and upon such payment the possession of the premises to be decreed to the plaintiffs.

The judgment will be reversed and the cause remanded, to be proceeded in according to the directions here laid down. The other judges concur.

HENRY COUNTY, Respondent, *v.* ROBERT ALLEN, PACIFIC RAILROAD, INTERPLEADER, Appellant.

1. *Agency — County Court — Subscription to railroads — Money not paid over, etc.* — A County Court levied a tax for the amount of its subscription to a railroad company, and appointed an agent to receive the money collected, and to pay it over "when ordered by the court." *Held*, that the railroad company had no specific or other lien on money collected and in the hands of the agent, but not ordered to be paid over. The money could be recalled from the agent at any time before payment to the company. And for refusal to restore the money on call, the agent became liable to his principal.

Appeal from Henry Circuit Court.

Hicks & Phillips, for appellant.

I. Allen was not the agent of the county. He was not, in fact, in the legal acception of the terms, an agent for any one. The County Court, being itself but an agent for the county, could not delegate its power. And Allen was but the mere instrument to do certain acts that the court itself might have done. (Hann. & St. Jo. R.R. Co. v. Marion County, 36 Mo. 302–3.)

II. The County Court made the subscription. It was valid and binding. All the authority the County Court had in relation to the subscription, etc., was administrative and not judicial.

To declare the subscription void would be a judicial proceeding. Where is the law found that clothes the County Court with jurisdiction to declare the subscription void? It has none. Its act of nullification was void. So was the order directing Allen to pay the money into the county treasury void. When the levy was made and collected, the County Court had no authority to make an order diverting the money from its proper destination, the Pacific Railroad.

H. B. Johnson and *F. P. Wright*, for respondent.

The railroad company would have no claim to specific money of the county in the hands of an agent before the same was ordered to be paid out, but would have to proceed directly against

the county to recover judgment, and to enforce payment of such judgment by *mandamus*.

Until the issue of such order, the funds were subject to the control of the County Court.

ADAMS, Judge, delivered the opinion of the court.

This was a suit for the recovery of a sum of money from the defendant, which he is alleged to have received as agent of the plaintiff and refused to pay over to plaintiff on demand. The Pacific Railroad Company was allowed to interplead in the case, and did so, claiming the money in the hands of defendant as its money. The case was determined in favor of the plaintiff, and judgment rendered against the defendant for $900, balance of money in his hands, and also judgment on interplea against the claimant, and the defendant and claimant have brought the case here by appeal.

The facts are substantially as follows: In 1855 the County Court ordered a subscription to the capital stock of the railroad company for $50,000, and appointed George R. Smith to make the subscription, which was done. The County Court afterwards levied a tax to be collected to pay the calls that might be made on this subscription, and appointed the defendant Allen as agent of the county to represent its interests in all matters connected with the subscription; "to receive the money from the county for the calls of the company for the stock subscribed by said county, and pay the same over to the company *when ordered by the court*, and superintend all the transactions necessary between said county and said Pacific Railroad Company, according to law and the order of the County Court; and that he entered into bond to the county of Henry in the sum of $20,000 for the faithful performance of his duty."

The defendant accepted this appointment, gave the bond, and entered upon the discharge of his duty; received from the collector, under this appointment, over $3,000, and paid it over to the railroad company on the call of the company, except the sum of $900 which was in his hands at the commencement of this suit. The County Court, after the payments referred to, assumed to

make an order on its records annulling the subscription and ordering its agent, Allen, to pay over the balance of the money in his hands into the county treasury.

Many questions have been elaborately argued by the learned counsel for plaintiff, defendant and claimant, which, in the light I view this case, it will be unnecessary to pass on, as they do not properly arise on this record, and anything that might be said would be merely *obiter dicta.*

The validity of the subscription to the railroad company is not involved in this case, and could only arise in a direct proceeding by the company against the county to collect the subscription. Nor is it necessary for us to decide whether the former suit by the Pacific Railroad Company would be a bar to a new suit to enforce payment of the subscription. Nor is it necessary for us to decide whether tax-payers were bound to pay the taxes levied to pay the calls on the subscription.

The County Court assumed that the county was indebted for the amount of the subscription, and proceeded to levy and collect taxes for payment of this indebtedness of the county. The money when so collected belonged to the county for the purpose of paying this alleged indebtedness. It went into the hands of the defendant, as agent of the county, to be paid over on the call of the company, under the order of the County Court. The Pacific Railroad Company had no specific or other lien on this money. It was the money of the county in the hands of its agent, and could be recalled at any time before payment to the company.

Where a principal places money in the hands of his agent to pay a debt, it does not become the property of the creditor. It remains in the hands of the agent, subject to the orders of the principal, and it is the duty of the agent to obey such orders. When the defendant refused to pay over the money to the county treasurer, as ordered by the County Court, he became liable to this action for the amount remaining in his hands.

Judgment affirmed. The other judges concur.

JAMES H. CONLEY *et al.*, Respondents, *v.* JOSEPH G. DOYLE, Appellant.

1. *Title bond, violation of — Notes — Action, nature of.* — One who, having received a title bond for land, gives his purchase-notes therefor, and takes them back while the debt still remains, thereby forfeits his claim on the bond; and if he had paid any one of the notes, his action should be specifically for the amount paid, and not for violation of the contract.

Appeal from Johnson Circuit Court.

Elliott & Blodgett, for respondents.

R. Hicks, for appellant.

BLISS, Judge, delivered the opinion of the court.

The defendant, in 1860, executed to the plaintiff a bond for a deed for 120 acres of land at the price of $1,000, to-wit: $300 down and the balance in one and two years, for which notes were given. The $300 was paid; but the troubles coming on, the plaintiffs entered the United States service and failed to pay the notes. It is in evidence that defendant told them not to trouble themselves about the payments; that when the war was over they would make it all right. The witnesses do not quite agree as to what was said, but it is agreed that the payments were not pressed, and no steps were taken to enforce or rescind the contract. In 1865, without further communication with the plaintiffs, the defendant sold and conveyed the land to one Roberts. On hearing of the sale, one of the plaintiffs called upon the defendant and claimed that they should be reimbursed for the amount paid. As to what passed at this and other interviews, there is conflicting testimony; but all the witnesses seem to agree that the defendant expected to refund something. The title bond had been accidentally burned, and defendant finally gave up the plaintiffs' notes.

The present suit purports to be instituted for a violation of the contract by selling the property while it was in force, and thus putting it out of defendant's power to comply with its terms.

Among the objections to plaintiffs' proceeding is the fact that

they not only did not pay the notes as they fell due, but have never tendered their amount, only averring a readiness to pay. If this were an action at law upon the bond under the old practice, it would be necessary to aver specifically and prove a performance by the plaintiffs of every condition precedent. In that case, if the sale to a third person had been in fraud of the vendee, so that the vendor, with intent to cheat, had voluntarily put it out of his power to convey, the damages might be more than the deposit; and it is held in such case that the value of the land at the time of the breach of the conditions of the bond may be recovered. (Sedgw. 186, and notes.) The pleader seems not to be clearly impressed with the nature of his remedy. The contract has been rescinded by the acts of the parties: first, by the defendant selling the property, treating the contract as at an end; and, second, by the plaintiffs taking back their notes, making no claim to the land, and only looking to defendant to refund what had been paid. The suit should have been specifically for that sum; and though the pleader seems to have had another view of the matter, yet the facts are all set forth, and the court gave the jury the correct rule of damages. The ends of justice would not be subserved by granting a new trial, for upon an amended pleading the judgment must be the same. It is clearly shown that the defendant waived the strict performance of the contract on the part of the plaintiffs, so that, at the time of the sale to Roberts, a specific performance could have been enforced. He took no steps to foreclose the plaintiffs' equity. They have mutually abandoned the agreement, and the money paid the defendant should be held for the use of the plaintiffs.

I feel some hesitation in affirming the judgment under the theory upon which the case was tried. The plaintiffs' counsel were misled by the decisions in this court under the old pleadings, and made in regard to a different class of contracts. Setting out the facts, they should have sued for the money and framed their instructions accordingly. The parties had abandoned the contract, and unless it was understood between them that in giving it up the claim for repayment was also surrendered, it still subsisted. It was claimed, upon the trial, that the surrender of the notes was intended as an

accord and satisfaction, but this matter was not properly given to the jury, and their finding upon that point could not have been otherwise.

Judgment affirmed. The other judges concur.

WM. DEWARE, Defendant in Error, *v.* BENJAMIN B. WYATT, Plaintiff in Error.

1. *Action compelling party to quiet title — Defense — Suit to quiet title may be brought in Federal court — Construction of statute — Non-resident defendant.* — In proceedings under the statute (Wagn. Stat. 1022, § 53) compelling defendant to show cause why he should not bring suit to try his title, it is a good defense that he has already done so in the United States court. He is not forced to take steps by affidavit, etc., to transfer the cause. The case is not one where the State court has obtained jurisdiction of the subject-matter. The statutory proceeding is not in the first instance for the purpose of settling the title, but preliminary to an action which the adverse claimant may be compelled to bring. And the order of the court does not respect the title, but the institution of the action.

In suit by claimant to adjust his title he may resort to the Federal tribunal, and will not be restricted to the court of the county where the lands are situate, as in State cases.

Such suit to show cause may be brought against a non-resident if proper service can be had upon him in the State.

Error to Johnson Court of Common Pleas.

H. B. Johnson and *R. F. Wingate*, for plaintiff in error.

Crittenden & Cockrell and *Elliott & Blodgett*, for defendant in error.

The facts stated, if true, were no defense to the action. The State court having obtained jurisdiction over the person of the defendant and the subject-matter of the action, has the right to retain it, and will retain it, unless the defendant, by affidavit filed at the first term, in pursuance of the twelfth section of the judiciary act of 1789, removes the cause into the Circuit Court of the United States. (Rogers v. City of Cincinnati, 5 McLean, 337; McLeod v. Duncan, *id.* 342.)

BLISS, Judge, delivered the opinion of the court.

The plaintiff filed his petition under the statute (Wagn. Stat. 1022, § 53), showing that he was in possession as owner of certain lands to which defendant makes some claim, and asks that he be summoned to show cause why he should not bring an action to try his title. The preliminary order was issued, and defendant answered that he was a citizen of Kentucky, and had already, and since the service of notice, commenced proceedings to vindicate his claim in the United States Circuit Court of Missouri. This answer was stricken out on motion and a peremptory order was issued, to reverse which defendant brings the case to this court.

The action of the court in striking out the answer was erroneous, as it furnished a good reason why the defendant should not be required to bring another suit. He had a right to bring his action in the Federal court, and it was not the intention of the statute to deprive him of that right, nor could it be done if such was the design. Counsel seem to imagine that the proceeding was a suit to try the title; that therefore the State court has acquired jurisdiction; and that defendant, if he would go into the Federal courts, must take steps to transfer the cause. But, in the language of Judge Ewing, in Von Phul v. Prim, 31 Mo. 333, "this proceeding is not one for the purpose of settling the title to the premises in the first instance, but is only preliminary to an action which the defendant or adverse claimant may be ordered to bring for that purpose;" and the order of the court after appearance is not respecting the title, but the bringing the action. The original proceeding would ordinarily be instituted where the lands lie; and the action being a local one, if a suit were instituted in the State court, it would be in the same county. But it is sufficient if it be instituted in any court having jurisdiction, and the claimant cannot be controlled by the person in possession in his selection of the tribunal; and if his return shows that an action has been commenced, the object of the petition is obtained and no further order can be had.

The Supreme Court of Massachusetts, in Macomber v. Jaffray, 4 Gray, 82, under a similar statute, deny the right to proceed

against a non-resident; but I do not see, if actual notice can be given within the State, why a foreign domicile should excuse the claimant from prosecuting his claim. This court, in Grant v. King, 31 Mo. 312, only held that actual notice must be given, which may be served as a summons in an ordinary suit, if the defendant be temporarily within the jurisdiction of the court.

As the defendant claims an interest, and has selected another tribunal in which to prosecute his claim, a difficulty arises in relation to the costs. The judgment must be reversed and the cause remanded, and all the costs made after the filing of defendant's answer should be taxed against the plaintiff; but the costs made before should, I think, be recovered of defendant. The other judges concur.

CHARLES BURDEN, Respondent, *v.* LEONIDAS HORNSBY, Appellant.

1. *Justice of peace — Jurisdiction — Amendment.* — A justice of the peace may permit a plaintiff to amend his statement so as to bring the amount within his jurisdiction.
2. *Practice, civil — New trial — Error.* — Error will not lie for granting a new trial.

Appeal from Johnson Court of Common Pleas.

Crittenden & Cockrell, for appellant.

Phillips & Vest and *Elliott & Blodgett*, for respondent.

BLISS, Judge, delivered the opinion of the court.

Suit was brought originally before a justice of the peace for killing plaintiff's dog, and the damages were laid at $100. On motion to dismiss for excess of claim, the plaintiff amended his statement so as to make his claim but $50, and went to trial. This leave to amend is the first error complained of, but it was perfectly proper to make the correction. The defendant appealed, and upon trial the verdict was in his favor. The court, however, on the plaintiff's motion, granted a new trial, and this is also claimed to be erroneous. It has long since been settled in Mis-

souri that error will not lie for granting a new trial. The reasons are set forth in Helm v. Bassett, 9 Mo. 52, and the doctrine is affirmed in Keating v. Bradford, 25 Mo. 86. Upon the second trial the evidence was all submitted to the jury upon fair instructions, and the case should have stopped there. I find no error whatever in the record.

Judgment affirmed. The other judges concur.

SHADRACH CHANDLER, Appellant, *v.* HEZEKIAH FLEEMAN *et al.*, Respondents.

1. *Fraud, proof touching.*—Fraudulent acts need not be proved by positive testimony, but there should be a chain of circumstances such as would reasonably satisfy the mind of their commission.
2. *Evidence — Opposite party — Impeachment.*— When one has made the opposite party his witness he cannot afterwards impeach his credibility.

Appeal from Cedar Circuit Court.

J. P. Tracy, for respondents.

The testimony does not disclose a fraudulent intent. (12 Mo. 169.) Debtors may give preference to creditors. (45 Mo. 431.) A *bona fide* purchaser for a valuable consideration is protected, although he purchase from a fraudulent grantor. (16 Mo. 594.)

When the facts are submitted to the court, the judgment will not be reversed and new trial ordered upon exceptions taken to the weight of testimony (1 Mo. 444); or unless it is clearly against the weight of evidence (4 Mo. 518; 6 Mo. 250); or unless the record shows that the court below was called upon to decide some questions of law, and that its decision was wrong (9 Mo. 48, 375; 10 Mo. 570); or unless exceptions are taken before verdict (9 Mo. 288); or unless declarations of law are asked or given (27 Mo. 161). There is no error in the finding of the Circuit Court, and the judgment should be affirmed.

E. F. Buller, for appellant.

WAGNER, Judge, delivered the opinion of the court.

We see no sufficient reason for disturbing the judgment in this case. The allegation was fraud, and the evidence failed to sustain it. Fraudulent acts need not be proved by positive testimony, but there should be a chain of circumstances such as would reasonably satisfy the mind of their commission. The suit was brought by the plaintiff, who purchased the land at a sale under execution, for the purpose of setting aside a conveyance as fraudulent, made by the defendant Hezekiah Fleeman to his two sons, who are also made defendants. The conveyance of the lands was made many years prior to the execution sale. The whole case turns on the evidence. Upon the trial the plaintiff introduced the defendants as witnesses in his behalf, and relied on their evidence principally to impeach the conveyance. Their answer denied all fraud or unfairness, and their testimony was positive as to the honesty and good faith of the entire transaction. The other two witnesses introduced really knew nothing about the case. Their testimony was unimportant, and not sufficient to overturn or impair the force of the two first witnesses, who were fully cognizant of all the facts. Again, as the plaintiff made the adverse parties his witnesses, he cannot now be allowed to impeach their credibility, though it is proper to remark that no effort is made to assail them. Were their evidence contradictory, or did it show prevarication or falsehood, we might still place the proper estimate upon it. But such does not appear to be the fact, and no reason is shown to doubt its truthfulness. The farm seems to have been sold for about its value at that time, the consideration has been fully paid, and the proof is not sufficient to show that the parties contemplated the defrauding or delaying the grantor's creditors.

The judgment should be affirmed. The other judges concur.

FREDERICK DEDO, Respondent, *v.* JAMES F. WHITE, ADMINISTRATOR OF RUSSELL B. FISHER, Appellant.

1. *Practice, civil — Verdict — Instructions — Appeal.*—When, on appeal, it appears that instructions were given and a verdict was rendered without any evidence on which to base either, the cause will be reversed and remanded.

Appeal from Bates Circuit Court.

H. B. Johnson and *Jas. S. Botsford*, for respondent.

F. P. Wright, for appellant.

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding originally commenced in the County Court, where the plaintiff filed a demand against the estate of Russell B. Fisher, deceased, for the sum of $610, being the value of two mares, two mules and one colt, the property of plaintiff, which, it is alleged, the deceased participated in taking and converting during his lifetime. The County Court rejected the demand, and an appeal was taken to the Circuit Court, where a jury awarded the plaintiff a verdict for $500, upon which judgment was entered and an appeal was granted to this court. Upon the trial, against the objection of the defendant, the plaintiff proved by one witness that he was taken prisoner in Kansas in September, 1862, by a gang of nine armed men; that the party divided, and while part of them kept him, the others went and took some stock from the plaintiff, and that there was one of the Fisher boys with the party; but that Russell B. Fisher was not with the men who took him prisoner, nor with the men who took the plaintiff's stock.

The next witness stated that he was taken prisoner in Kansas by a band of men, and that three of the Fishers were along, but that Russell B. Fisher was not with them; that the next day after he was taken prisoner the band had in their possession two mares, two mules and one colt, which had belonged to the plaintiff, but that he did not know who took them. The witness further stated that he was taken by the men to West Point, in

Bates county in this State, and while stopping there only a minute Russell B. Fisher appeared among others, "a scare was got up," and a mule was pointed out to him (Russell B. Fisher) by the band of men, which they told him they had got in Kansas. The mule pointed out belonged to plaintiff, but they did not say so, and he (Fisher) told them they had better take care of themselves. This was all the evidence in the case. There was no attempt to prove the value of the animals or the amount of damages.

The court, at the instance of the plaintiff, then instructed the jury that if they believed from the evidence that Russell B. Fisher commanded, or was at the time and immediately after the time commander of the men who took said property, and converted the same to his own use, they should find for the plaintiff the value of the property so taken; and that, although the jury might find from the evidence that Russell B. Fisher was not present at the actual taking of the property, yet if they believed that the property was taken by and retained in his command, by and with his consent afterwards, they should find for the plaintiff.

It is obvious that there was no testimony to justify the giving of these instructions. Throughout they assume facts which were not proved. There is no evidence that Russell B. Fisher was the commander of the men or had any connection with them, and the jury are told to find for the value of the property when no evidence of value was given. There is nothing to show that he ever converted the property or ever assented in any manner to its taking, or approved of the act after it was taken. The remark that the men had better take care of themselves, taken by itself —and that is all there is to connect him with them—is utterly insufficient to go to the jury to show that he was a participator, or had anything to do with the trespass, either at the time or afterwards.

The judgment must be reversed and the cause remanded. The other judges concur.

GARRETT C. LAND, Appellant, *v.* COFFMAN & CHURCHILL, Respondents.

1. *Railroads — Lands, deeds of, to — Speculation — Railroad lands.* — It was the intention of the Legislature, as shown by the various acts creating and governing the Pacific Railroad Company (see sections 1 and 20 of its charter, Sess. Acts 1849, p. 219 *et seq.*; Sess. Acts 1851, p. 272, § 9; R. C. 1855, p. 425, § 29, and p. 438, § 57), to invest that corporation with power to hold real estate: 1st, for the purpose of aiding in the construction of its road, or raising funds to pay debts contracted in its construction; 2d, for depots, road-beds, etc. The company cannot become a large landed proprietor for purposes not connected with its creation. But the amount of lands which it may receive cannot be determined in a suit between private parties. That question can only be raised by the State, in a direct proceeding against the railroad company.
2. *Railroads — Lands, deeds of, to — Speculation in lands by railroads — Specific performance — Executory contracts.* — Although, in a suit for the specific performance of an executory contract to deed land to a railroad company, the contract may be incapable of enforcement, as being intended for purposes of speculation (see Pacific R.R. Co. v. Seeley, 45 Mo. 212), yet if the deed were in fact made voluntarily, it will be good to pass title.

Appeal from Johnson Court of Common Pleas.

Elliott & Blodgett, for appellant.

I. The second exception taken by the plaintiff, on the trial of his cause, was to the reading in evidence of the deed from Johnson and others to Billon, trustee for the railroad company. The plaintiff objected "for the reason that said deed shows upon its face that the town lots therein described were sought to be conveyed to the company for speculative purposes, and that the same was therefore void."

By reference to the deed we find that it purports to convey to the company, 1st, five and a half acres of ground (as therein described by metes and bounds), designated upon the plat of said town as depot grounds; 2d, it seeks to convey to the company one hundred and fifty-one separate and distinct town lots, embracing every alternate lot in twenty-six different blocks, throughout said entire tract of eighty acres, and all separated by streets, avenues and alleys, from the right of way and depot grounds of the company and from each other.

In the case of The Pacific R.R. Co. v. Seeley, 45 Mo. 212, the action was to compel a specific performance of a contract to convey to such person as the directors of said company should designate, one-fourth of all the town lots contained in one hundred and sixty acres of land. This court held upon demurrer, in that case, that the contract sued on was void upon its face, for the reason that the company had no power under its charter to engage in town speculations or in the purchase of lands, and holding them for villages and towns, either to rent or sell.

If the contract with Seeley was void upon its face for the reason that this same company had no power to purchase or speculate in one-fourth the town lots in one hundred and sixty acres of land at Tipton, then by what parity of reasoning can the defendants contend that a deed to the company by Johnson and others of one-half the town lots in eighty acres at Knob Noster (being the same amount in both cases) would be within the corporate powers of said company? The fair deduction would rather seem to be that, if the contract with Seeley was void for the reason that the company had no power under its charter to deal in town lots or other real estate, then the deed from Johnson to the company was likewise void for the same reason.

II. The third objection assigned by the plaintiff for the exclusion of said deed, and overruled by the court, was "because the deed shows upon its face that the town lots therein described were not necessary for any purpose connected with the general business of locating, constructing, managing or operating said railroad, or necessary for the purpose of carrying said road into complete and successful operation." In support of this proposition we submit that when the Legislature, by the twentieth section of the original charter, confined the operations of this company to the business of locating, constructing, managing and operating its road, and the acts necessary for the purpose of carrying the same into complete and successful operation, it was certainly intended to keep the business of the company within certain fixed limits, and to prohibit it from engaging in any kind of business wholly foreign to the purposes for which the company was created. The only acts which the Pacific Railroad Company could lawfully do under

its charter were, 1st, to locate its road; 2d, to construct its road; 3d, to manage and use its road.

The company, then, being organized for the purposes and possessing only the powers aforesaid, and the deed showing upon its face the extraordinary fact of a railroad company purchasing one hundred and fifty town lots (in addition to its depot grounds), which, in the very nature of things, and according to the common understanding of every one, could not be used for any known business connected with a railroad company, and the purchase of that number of lots being an exception to all common experience, the natural presumption is that the lots were purchased for speculation, and that they were not required by the company in its legitimate operations, and the burden of proof was upon the defendants to show the contrary; and until the contrary was shown, the deed should have been excluded. (Downing v. Mt. Washington, etc., 40 N. H. 233; 3 Zabr., N. J., 510.) Had the company possessed a general power to buy and sell lands, the rule might be otherwise, but there are no presumptions in favor of a corporation of limited powers.

The defendant's fifth instruction declares "that the question of whether the Pacific Railroad Company has the power, under its charter, to take and hold the lots sued for, cannot be inquired into in this suit, but can only arise in a proceeding instituted directly by the State for the purpose of ascertaining whether said company has or has not exceeded the powers granted in its charter." If this theory ever had any footing in this country, it was applicable only in those cases in which corporations were authorized by their charters to purchase real estate, but not to hold beyond a certain limited amount, and even then the doctrine has been applied only in those States where the English statutes of mortmain have been held to be in force. This distinction between the power to purchase and the power to hold was taken by the courts of Pennsylvania at an early day, and those early cases are often referred to, both by courts and counsel, in subsequent cases in other States, where the doctrine could have no possible application whatever; for upon examination of those cases (Leazure v. Hillegas, 7 Serg. & R. 313, and Baird v. Bank of Washington, 11

Serg. & R. 411) it will be found that they are decided expressly upon the point that the banks had the power to purchase but not to hold real estate, and that, such being the case, the property escheated to the State under the operation of the English statute of mortmain, which the courts declared to be in force in that State. The reason why it was held in these and similar cases that the grantee held an estate defeasible at the will of the State, is readily perceived when it is considered that when a grant was made to a corporation in violation of the statute of mortmain, the estate thereupon escheated to the crown or to the State by the express terms of the statute; or in other words, the State became seized of the estate by operation of law. The State, then, being seized of the estate by force of the statute, was, as a matter of course, the only party who could properly institute proceedings for possession. The statute, not the deed, estopped the grantor in those cases. The theory of those cases can have no application to the case at bar, for two reasons: 1st, because the Pacific Railroad Company is prohibited both from purchasing and from holding real estate for purposes foreign to the objects specified in the seventh section of its charter; 2d, because the statutes of mortmain have no application in this State and are not held to be in force here. (See 2 Kent, 282; Chambers v. City of St. Louis, 29 Mo. 575.)

The real point of difference between the case of Chambers v. The City of St. Louis and the case at bar is this: the city of St. Louis had, under its charter and the general law concerning corporations, the power to purchase and hold real estate without reference to quantity or location, and it was therefore capable of acquiring rights to be enforced; whereas the Pacific Railroad Company has neither the power to purchase or hold, except for certain specific purposes, which are defined in its charter, and beyond those purposes it could acquire no rights to be enforced or title to be questioned. The same questions presented in the case of Chambers v. The City of St. Louis were also presented in Boyce v. The City of St. Louis, and in that case the court held that the city could not hold real estate for purposes foreign to the objects of its incorporation. (29 Barb. 650; The People v. Mau-

ran, 5 Den. 389; The Bank v. Poitiaux, 3 Ran., Va., 136; Baird v. Bank of Washington, 11 Serg. & R. 411; Silver Lake Bank v. North, 4 Johns. Ch. 370.) In each of these cases (and in all others cited by defendants in support of the theory of their fifth instruction) it will be noticed that the corporations had the power to purchase real estate. So in the case of Bogardus v. Trinity Church, 4 Sandf. Ch. 758, and in Barrow v. Nashville & Charlotte Turnpike Co., 9 Humph. 304, the proceedings were to set aside conveyances made to corporations, and the courts held that the corporations having the power to purchase, and having acquired complete titles at the time the conveyances were executed, they could not afterwards be set aside or avoided at the suit of a private individual.

The position which we take in this case is that the Pacific Railroad Company is a private corporation, and that it possessed no power to take or hold real estate for any purpose or to any amount beyond the limits prescribed by its charter, and that all deeds of land or lots to said company beyond the amounts authorized by its charter, or for purposes foreign to the objects of its creation, are utterly void, for the want of capacity in the corporation to take the title. In this position we believe we are sustained by all the books and authorities. "There can be no doubt that if a corporation be forbidden by its charter to purchase or take lands, a deed to it would be void, as its capacity may be determined from the instrument which gives it existence." A prohibition, reservation or exception in a charter must stand in full force, though it destroy or make nugatory all the powers given to the company. (Commonwealth v. Erie & N. E. R.R. Co., 27 Penn. 351; Ang. & Ames Corp., § 152.) The Pacific Railroad Company is prohibited by its charter from holding real estate beyond a certain amount. The language of the charter is (§ 7) "and for that purpose hold a strip of land not exceeding one hundred feet wide, except," etc. But even was the charter silent upon the question of holding real estate, then its mere silence would be as absolute a prohibition as positive words of restriction. (Blount v. Walker, 11 Wis. 457.) And we submit that if a deed to or a contract with a corporation is void for the want of capacity in the corporation

to take the title or make the contract, then it is not a question between the corporation and the State; but any party interested in the act may take advantage of any defect of power in the corporation to do such act. In further support of the position that all contracts made by corporations which are *ultra vires* are absolutely void, and that any party interested may take advantage of any defect in the power of the corporation to make such contracts, and that it is not a question between the corporation and the State, we refer to cases following: Penn. & Del. Canal Co. v. Dandridge, 8 Gill & J. 248; Hood v. N. Y. &. N. H. R.R. Co., 22 Conn. 502; Elmore v. Naugatuck R.R. Co., 23 Conn. 457; The Mutual Savings, etc., v. The M. A. Co., 24 Conn. 159; Naugatuck R.R. Co. v. The W. B. Co., *id.* 468; Bank of Mich. v Niles, 1 Doug., Mich., 401; Orr v. Tracy, 2 Doug. 254; Root v. Godard, 3 McLean, 102; Root v. Wallace, 4 McLean, 8; Dodge v. Woolsey, 18 How. 331; Pierce v. Mad. & Ind. R.R. Co., 21 How. 442; 3 Wend. 482, 573; 7 Wend. 31.

Phillips & Vest, for respondents.

I. The question whether the Pacific Railroad Company has the power, under its charter, to take and hold the real estate sued for, cannot be raised in this suit, but the same can only be tried in a proceeding by the State through its proper officers, instituted directly for the purpose of ascertaining whether said company has or has not exceeded the powers granted by its charter. This case is totally unlike that of The Pacific R.R. Co. v. Seeley *et al.*, 45 Mo. 212. In that case the Pacific Railroad Company brought suit against Seeley's heirs for the specific performance of an executory contract for the conveyance of real estate to the company, based upon the consideration that the company would locate a freight and passenger station on the land of said Seeley, and this court very properly decided that the contract could not be enforced. In the case at bar, while it may be admitted that the consideration was similar, the title has been conveyed to the trustee of the company, and then passed through several parties to the respondent. "A good defense to a bill for specific performance may be a very bad ground for a bill to set aside an executed contract; and when

a corporation, vested with power to take and hold real estate for specific purposes, purchased and took a conveyance of land, and afterwards used the land for other purposes than the charter permitted, the abuse of power was deemed to be no ground for setting aside the deed at the instance of the vendor." (Ang. & Ames Corp. 137, §§ 151–4.) In the case of Barrow v. The Nashville & Charlotte Turnpike Co., 9 Humph. 304, it was decided "that the want of power in a corporation to contract for and hold land, creates no equity in behalf of the vendor to rescind the contract. It is a matter of no concern to him whether the corporation exceeded its powers or not." Appellant claims under the sheriff's deed conveying to him the interest of Johnson, one of the grantors to the trustee of the Pacific Railroad Company, and the theory upon which he hopes to recover is that the company having no power under its charter to purchase and hold the land conveyed, the title never passed from the grantors until purchased by the appellant. Conceding that the Pacific Railroad Company exceeded its powers as to the land in suit, the question is, what became of the title? Did it remain in the grantors, or did the company take a defeasible estate subject to be divested by the State, upon office found, as in the case of aliens? That the latter position is correct, has been decided in all the States where the question has arisen. In the case of Chambers v. The City of St. Louis, 29 Mo. 567, this court declared that "if, in holding and purchasing real estate, the city of St. Louis passes the exact line of her power, it belongs to the government of the State to exact a forfeiture of her charter; and is not for the courts in a collateral way to determine the question of misuser by declaring void conveyances made in good faith." The same doctrine is enunciated in the following cases: Runyan v. Lessee of Coster, 14 Pet. 122; Baird v. Bank of Washington, 11 Serg. & R. 418; The Banks v. Poiteaux, 3 Randolph, 136; Leazure v. Hillegas, 7 Serg. & R. 319; Abb. Dig. Law of Corp. 339, § 12; Silver Lake Bank v. North, 4 Johns. Ch. 370; Burns v. Milwaukee & Miss. R.R. Co., 9 Wis. 457; Goundie v. Northampton Water Co., 7 Barr, 233. If the conveyance to the Pacific Railroad Company by Johnson and others was contrary to public policy,

yet after the execution of the deed, the grantors or those claiming under them cannot attack the title conveyed. The grantors are *in pari delicto* with the company, and the title will be left where it has been put by the act of the parties. There is no evidence in regard to when the debt was contracted by Johnson for which the land was sold, but the record shows that the judgment was obtained on the 21st of April, 1865, and the execution levied on the 16th of March, 1870, while the deed to the company was made on the 18th of December, 1858. In the time intervening between the conveyance and the levy and sale, a flourishing town has sprung into existence upon the land, and thousands of dollars have been expended in improvements by persons in no way connected with the original transfer. In such a case this court will not interfere. (Farmers' & Millers' Bank v. Detroit & Milwaukee R.R. Co., 17 Wis. 372; Bissell v. Michigan Southern R.R. Co., 22 N. Y. 258.)

II. It will be noticed by reference to the language of the acts creating and governing the Pacific Railroad Company (Sess. Acts 1849, p. 220, § 7; Sess. Acts 1851, p. 272, § 9) that there is no express prohibition upon the company as to the purchase of or taking lands. There can be no doubt that if a corporation be forbidden by its charter to purchase or take lands, a deed made to it would be void, as its capacity may be determined from the instrument which gave it existence. There is, however, a broad distinction between a prohibition to purchase or take, and a prohibition to hold; and when the act incorporating a bank made it capable "to have, hold, purchase, receive, possess, enjoy and retain lands, rents, tenements, goods, chattels and effects of whatever kind, nature or quality, to the amount of two millions of dollars and no more; provided, nevertheless, that such lands and tenements, which the said corporation are hereby enabled to purchase and hold, shall only extend to such lot and lots of ground, and convenient buildings and improvements thereon erected, or to be erected, which they may find necessary and proper for carrying on the business of said bank, and shall actually occupy for that purpose," it was decided by the Supreme Court of Pennsylvania that the bank might purchase, absolutely, lands in a distant

country which they did not occupy, though they, or the third person to whom they might convey, would hold them by a title defeasible by the commonwealth and the commonwealth alone, as is the case with the title of aliens. In an action of ejectment the question of exceeding its powers by a corporation cannot be determined. (Ang. & Ames Corp. 137, § 151–3; McIndoe v. St. Louis, 10 Mo. 576; Baird v. Bank of Washington, 11 Serg. & R. 418; Leazure v. Hillegas, 7 Serg. & R. 319; Goundie v. Northampton Water Co., 7 Barr, 239, 240.)

In the case of The People and Health Commissioner of New York v. Mauran *et al.*, 5 Den. 389, the Supreme Court of New York held "that every corporation may convey whatever they have taken, whether able to hold it or not. The consequence is that the grantees of the company took the estate as they held it, absolute or defeasible as might be. Corporations have a fee simple for the purposes of alienation, and a determinable fee for the sake of enjoyment." (29 Verm. 93; 8 Dana, 129; 2 Kent's Com. 326–7.) We have no disposition to controvert the settled rule that a corporation possesses only those properties which the charter expressly or incidentally confers upon it, nor do we assert that the Pacific Railroad Company had authority to become a real estate broker or speculator in town lots, but we do contend that the title to the lands in suit having been conveyed by deed to the company, even if in excess of its power to hold them, the company could then convey to third parties, and the title thus conveyed, although defeasible by the State, is good as to the remainder of the world.

III. That the restriction found in the charter of the Pacific Railroad Company, and similar restrictions in other charters, were intended by the Legislature to apply to the power of corporations in this State to hold lands, is evident from section 2, page 297, Wagner's Statutes. Ample provision is there made for any railroad company's acquiring real estate in any quantity to aid in the construction, maintenance and accommodation of its railroad, and the enactment is in accordance with the statute of mortmain, which was held to apply to the holding real estate by corporations, not to the proceeds of the sale of real estate. (2 Kent's Com. 229; Ang. & Ames Corp. 136.)

ADAMS, Judge, delivered the opinion of the court.

This was an action of ejectment. Both parties claimed under one James C. McKeehan, who was the patentee under the United States for the land on which the lot in controversy was situated.

The defendants claim title through the Pacific Railroad Company, or rather through Frederick L. Billon, trustee for the sole use and benefit of the Pacific Railroad Company. The deed to Billon embraced 151 town lots, distributed alternately throughout the town of Knob Noster, situated on the line of said railroad, and five and a half acres of depot grounds, and was executed to the said trustee in 1858, for the use of said company, for and in consideration of the sum of one dollar and the benefits which the grantor expected to obtain from the location of a passenger and freight station upon the land thereby conveyed; and the deed also authorized a sale by the trustee of all such portions of the real estate thereby conveyed as should not be required for the purposes of said road, at such time and in such manner as the board of directors of said company should deem most conducive to the interest of said company.

The defendants claimed title under and through this conveyance to Billon, and have the oldest paper title, provided the deed to Billon as trustee is valid.

Numerous instructions were given and refused, raising the question as to the power of the Pacific Railroad Company to take, hold and dispose of the lands in question; and the Circuit Court having decided these questions in favor of the defendants, the plaintiff has brought the case here by appeal.

The question as to the power of the Pacific Railroad Company to receive grants of land and to dispose of them depends upon the proper construction of its charter and the laws of this State referring thereto. By the first section of the charter, among other things, it is provided that it "may hold, use, possess and enjoy the fee simple or other title in and to any real estate, and may sell and dispose of the same." (See Laws of Mo. 1849, p. 219.) The seventh section of this act was amended in 1851 (Laws of 1851, p. 272, § 9), and provides that "said company

shall have power to locate and construct a railroad," etc., "and for that purpose may hold a strip of land not exceeding one hundred feet wide, except where it may be necessary for turn-outs, embankments or excavations, in which case they may hold a sufficient width for the preservation of their road, and may also hold sufficient land for the erection and maintenance of depots, landing places or wharves, engine-houses, machine shops, warehouses, and wood and water stations."

Section 20 of the act of 1849, above referred to, provides that "the operations of said company shall be confined to the general business of locating, constructing, managing, and using said railroad, and the acts necessary or proper to carry the same into complete and successful operation."

By section 57 of an act entitled "An act to authorize the formation of railroad associations and to regulate the same," approved December 13, 1855, it is provided that "all existing railroad corporations within this State, and such as now or may be hereafter chartered, shall respectively have and possess all the powers and privileges contained in this act, and they shall be subject to all the duties, liabilities and provisions not inconsistent with the provisions of their charter contained in this act."

Among the privileges referred to in this section are those contained in section 29 of the same act (R. C. 1855, p. 425), which provides that such company may "take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroad, but the real estate received by voluntary grant shall be held and used for the purpose of such grant only." It may also "purchase, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its railroad, and the stations and other accommodations necessary to accomplish the object of its incorporation."

From these enactments it is evident to my mind, that it was the intention of the Legislature to invest the Pacific Railroad Company with power to take two classes of real estate; one class it had the right to receive and dispose of at pleasure, for the pur-

pose of aiding in the construction of its road, or for raising funds to pay debts contracted in its construction, etc.; the other class it can hold only for depots, road-beds, etc. The history of the country shows that this is the proper construction of the acts referred to. From the time the charter was granted, donations of real estate to aid in its construction have been made all along the line of the road, and titles have been acquired and investments made on the faith of this being the proper construction of the charter. It is true that this company, like all other corporations, is subject to all the limitations expressed in the charter, but the charter and the laws above referred to expressly authorize grants of land to be made to aid in the construction of the road.

The State considered this railroad company able to receive the lands donated by Congress without any enlargement of its charter, and accordingly made the grant to aid in the construction of the main trunk line to the bifurcation of the Southwest branch, and from that point to apply the lands to the Southwest branch.

Although this railroad company may receive grants of land, and sell and dispose of the same for the purposes of its construction and payment of its debts, etc., it cannot become a large landed proprietor for purposes not connected with its creation. But the amount of lands it may receive cannot be decided between these parties; conceding the power to receive lands for the purposes aforesaid, no one, except the State, can raise the question as to the amount that may be received. This was decided by this court in the case of Chambers v. The City of St. Louis, 29 Mo. 576–7; also by the Supreme Court of the United States in the case of Meyer v. Croft, reported in the May number of the Law Register for 1872; see also to the same effect, Smith v. Shely, decided by the Supreme Court of the United States at the December term, 1871.

Judge Scott, in Chambers v. The City of St. Louis, says, delivering the opinion of the court: "There being a right in the city to take and hold lands, if there is a capacity in the vendor to convey, so soon as the conveyance is made there is a complete sale; and if the corporation, in purchasing, violates or abuses the power to do so, that is no concern of the vendor or his heirs. It is a matter between the State and the city."

So this question can arise only in a direct proceeding by the State against the Pacific Railroad Company, and not in a collateral proceeding like this. The case of The Pacific R.R. Co. v. Seeley's Heirs, 45 Mo. 212, was a suit in equity for the specific conveyance of lands, and not an executed conveyance. That case went off on the ground that the contract in question upon its face showed that it was against public policy. The petition was demurred to and the demurrer was sustained by the Circuit Court, and this judgment of the Circuit Court was properly affirmed by this court, on the ground that the contract was void as being against public policy.

There is a manifest distinction between executory and executed contracts. While a party may not be compelled by a court of equity to carry a contract into specific execution, yet if he should voluntarily make a deed, it will be good to pass all his title.

The case of The State v. Commissioners of Mansfield, 3 Zabr., N. J., 510, so strongly relied on by the counsel for appellants, is not in conflict with any of the doctrines here laid down. In that case the Camden & Amboy Railroad and Transportation Company claimed that certain real estate consisting of houses and lots owned by that company and let by them to their workmen and employees, were exempt from taxation under a clause in their charter exempting the company "from all further taxation." The court held that this property was liable to taxation, while the road-bed, turnouts, etc., were exempt, thereby holding that there were two classes of real estate which the company had the power to acquire and hold, the one being liable to taxation and the other exempt. The same doctrine was maintained in Massachusetts in the case of The Inhabitants of Worcester v. The Wilson R.R. Corporation, 4 Metc. 564, which is looked upon as a well-considered case. (See also Whitehead v. Vineyard, *ante*, p. 30.)

Under the view we take of this case the judgment must be affirmed. The other judges concur.

WILLIAM PEACOCK, PUBLIC ADMINISTRATOR IN CHARGE OF THE ESTATE OF JACKSON MADDOX, DECEASED, Respondent, *v.* RICHARD H. NELSON, Appellant.

1. *Sale of lands — Agency — Suit at law for balance — Statute of frauds — Parol evidence.* — Land was conveyed by deed absolute on its face, and for an alleged valuable consideration, but in fact without consideration, with a verbal agreement that the grantee should sell the land as agent for the grantor and account for the proceeds. *Held*, that the agreement, not being in writing, as required by the statute of frauds (Wagn. Stat. 655, § 3), could not be carried out, and could not be shown in evidence for that purpose. But the agreement would raise an implied trust in the grantee to account for the land and its proceeds to the grantor, and proof of the bargain as shown the last named trust would be competent under the statute of frauds. That act contemplates express and not implied trusts. In such case the grantor might sue for the recovery thereby of the balance of proceeds in the hands of the grantee, declaring upon the agreement merely as inducement, and the cause would be properly submitted to the jury.
2. *Practice, civil — Evidence — Verdict — Appeal.* — Where there is evidence to support a verdict in a law case, the Supreme Court will not disturb it.

Appeal from Jackson Circuit Court.

T. T. Gantt, for appellant.

Maddox's administrator relies upon certain verbal admissions and verbal testimony to show that the deeds were made upon a different consideration than that shown on their face; that they were made, in fact, in order to enable Nelson to sell the land conveyed, in trust that he would pay the net proceeds to Maddox. Such testimony is incompetent under the statute of frauds. (Wagn. Stat. 655, § 3.)

(Section 4 of this chapter contains an exception in favor of such trusts as result by implication of law from the deeds themselves. But this is so clearly out of the scope of the case under examination that no more need be said on that score, and we only consider the application of section 3 to the facts.)

No verbal evidence was admissible to vary, add to, or detract from the deed. (1 Sugd. on Vend. 177; Maigley v. Hauer, 7 Johns. 341–2; Kidd v. Carson, 33 Md. 37; Hogel v. Lindell,

10 Mo. 488–9; Montany v. Rock, *id.* 506–8.) In the cases of Jackson v. Fish, 10 Johns. 450; Benedict v. Lynch, 1 Johns. Ch. 381; Leonard v. Vredenburg, 8 Johns. 29, the parol evidence was not repugnant to the terms of the deed. Counsel cited generally: Bradley v. Bradley, 24 Mo. 311; Smith's Adm'r v. Thomas, 29 Mo. 307; 31 Mo. 75; Lane v. Ewing, 31 Mo. 75; Flint v. Shelton, 13 Mass. 446; Myers v. Fields *et al.*, 37 Mo. 434; Jennings *et al.* v. Brizeadine, 44 Mo. 332.

R. Hicks, for appellant.

The verbal testimony offered by respondent, whether to prove a trust or to contradict, vary or modify the contract recited in the deed from Maddox and wife to Nelson for the land, the price of which is in controversy, was incompetent and irrelevant, and the court erred in permitting the same to go to the jury over the objection of appellant. (Morse v. Shattuck, 4 N. H. 229; Hall v. Hall, 8 N. H. 131; Wilkinson v. Scott, 17 Mass. 256; Gully v. Grubb, 1 J. J. Marsh. 388; McCrea v. Purmont, 16 Wend. 460, 475; Davenport v. Mason, 15 Mass. 89; Boyd v. Stone, 11 Mass. 347; Brigham v. Rogers, 17 Mass. 573; Stockpole v. Arnold, 11 Mass. 26; Graves v. Graves, 9 Foster, N. H., 944–5; Farrington v. Barr, 36 N. H. 88.)

This is a collateral action, not founded on the contract recited in the deed, but on a parol agreement made anterior to the execution and delivery of the deed. Now, what right to the land, the price of which is in controversy, was vested by virtue of the deed in appellant? The absolute estate in fee simple. What right and title to the same land was extinguished by that deed? Why, all the right, title and interest Maddox had in the land was transferred to and vested in Nelson. What, then, is proposed to be done by said verbal testimony? Is it to prove an agreement anterior to the deed, independent of and collateral to the deed, not repugnant and contradictory to any of the rights or interests vested in appellant by virtue of said deed? Is it proposed by such verbal testimony to prove such anterior verbal agreement without revesting Maddox with any interest in said land, either legally or equitably? No such thing. It was to show that the

deed did not convey what it purported to convey; that Maddox had a resulting trust in the land; that the land was not sold; that Nelson held the land for Maddox, and that Maddox had an equitable interest in the land.

Wm. Douglass, for appellant.

I. The case stated in the petition is one of exclusive equity jurisdiction. It states that a trust was created of said lands for the benefit of Maddox, with Nelson as trustee. (2 Sto. Eq., § 994.)

II. The plaintiff, then, claiming under a trust, must, as the trust is denied in the answer, establish its existence by writing. (Gen. Stat. 1865, ch. 106, § 3; Lane v. Ewing, 31 Mo. 75; Steere v. Steere, 5 Johns. Ch. 1; Irwin v. Ivers, 7 Porter, Ind., 308; Lantry v. Lantry, 51 Ill. 458.) Such trust cannot be proved by parol, although a resulting or implied trust may. But this is not a resulting or implied trust. Lord Hardwicke, in Lloyd v. Spillet, 2 Atk. 150, says that "a resulting trust arising by operation of law, exists: 1st, when the estate was purchased in the name of one person, and the consideration came from another; 2d, when a trust was declared as to part, and nothing was said as to the residue, that residue remaining undisposed of remained to the heir at law." (1 Greenl. Ev., § 266; 4 Kent, 306; Hogel v. Lindell, 10 Mo. 483; Montany v. Rock, 10 Mo. 506.) There is no pretense of such a resulting trust here, and there is a complete failure to prove any trust by writing. Upon the evidence, then, the plaintiff could not recover, and the instruction to that effect, asked by the defendant at the close of plaintiff's case, ought to have been given. (Harris v. Woody, 9 Mo. 113; Boland v. Mo. R.R., 36 Mo. 484; Jaccard v. Anderson, 37 Mo. 91; Smith v. Hann. & St. Jo. R.R., 37 Mo. 247; Callahan v. Warne, 40 Mo. 131; McCarthy v. Wolf, 40 Mo. 520; Singleton v. Pacific R.R., 41 Mo. 465.)

III. The defendant being charged as trustee, the case was one of exclusive equity cognizance, and was for the court and not for the jury to try. In such case "no action at law will lie; it is a case for the consideration of the court." (Sturt v. Mellish, 2 Atk.

612; see also Watkins v. Holman, 16 Pet. 59.) The objection of defendant, then, to trying the case before a jury ought to have been sustained, and the motion filed by him to discharge the jury before any evidence was heard, is supported by the best authority.

J. E. Merryman and *W. M. Chrisman*, for respondent.

In order to recover in this case it was not necessary for the plaintiff to have proven the agreement by any instrument of writing or by written testimony, for the reason that the agreement is not within the statute of frauds. "It is not necessary that the *assumpsit* for the price of the land should be in writing. This is not required to be written. Besides, the statute has not been construed to apply to executed contracts. And the grantor is entitled to recover on the promise made in consideration of the execution of the deed." (Gully v. Grubbs, 1 J. J. Marsh. 388; 6 Greenl. 364; 7 Greenl. 179; Roberts v. Tennell, 3 Monr. 247.) Where land is conveyed to the grantee upon an agreement that the grantee shall pay to the grantor the proceeds he may realize out of a re-sale of the land, an action of *assumpsit* may be maintained on the agreement. (Graves v. Graves, 45 N. H. 323–4; Hall v. Hall, 8 N. H. 129; 36 Me. 413.)

There was no use reserved in favor of Maddox, because he takes the independent promise of Nelson to pay him an amount of money, and because not a word was said that either the land or the use of it should ever return to Maddox. There was no trust and use, because Nelson never intended that the sale should be a conditional one, and defendant sets up none in his answer and joins issues on the consideration for the sale of the land. The only remedy that Maddox or his administrator has is *assumpsit* on the agreement; and to debar him of that remedy would be committing a fraud on him, which the statute never intended. If the parties had intended to reserve a use for Maddox in the land, they would have done so by putting it in writing. (1 Sugd. Vend. 155, note.)

ADAMS, Judge, delivered the opinion of the court.

The amended petition, upon which this case was tried, substantially stated the facts to be that the plaintiff's testator, Larkin

Maddox, in 1865, conveyed in fee to the defendant some 3,000 acres of land situated in Jackson and Cass counties; that although $11,500 is named in the deed as the consideration, there was, in fact, no consideration at all paid or agreed to be paid by the defendant, but the conveyance was made to the defendant merely for the purpose of enabling him to act as the testator's agent in the sale of the lands, and that the express agreement between them was that he was to sell the lands and account to the testator for the proceeds; that the defendant did sell all the lands except 450 acres, and realized a large amount of money; that on the 31st of August, 1865, the defendant had a settlement with the testator, and acknowledged upon such settlement that he had in his hands $19,410 of the proceeds of the sale of these lands.

The petition then alleges that, notwithstanding the agreement in relation to the sale of the lands, the defendant, since the death of the testator, denies that he made the agreement, and asserts that he purchased the lands absolutely and unconditionally. The petition then credits the defendant by several alleged payments on the amount so alleged to have been due upon settlement, leaving a balance of $16,630.96 for which the plaintiff as administrator asked judgment. The answer denies the material facts stated in the petition.

When the case was called for trial the defendant objected to a trial by jury, on the ground that it was a suit in chancery and not an action for the recovery of money only; but the court overruled the objection, and the defendant excepted. The case was then submitted to a jury, and they found a verdict for the plaintiff for more than $17,000. The usual motion for a new trial was made and overruled, and the defendant has brought the case here by appeal.

Upon the trial of the case the defendant objected to all parol evidence of the alleged agreement between the defendant and the plaintiff's testator, and of the terms on which the conveyance was made, and the learned counsel for defendant have made the point here and elaborated it with ability, that to suffer parol evidence to establish the alleged trust would be to overthrow the statute of

frauds and perjuries, which requires trusts to be manifested and proved by a writing to be signed by the party creating the trust.

This is true in regard to express trusts, but the statute expressly excepts from its operation trusts arising by implication. If A., for valuable consideration paid by B., conveys land to him to be held in trust for C., and this trust is not expressed in the deed, it cannot be proved by parol evidence; and although created by parol, it must be manifested or proved by some writing to be signed by B. If no writing is produced, B., who paid for the land, will hold it discharged of the alleged parol trust. But suppose, in the instance named, A., without any consideration whatever moving from B., conveyed the land to him with the express agreement that he would declare a trust in favor of C., and after thus obtaining the land B. should refuse to declare the trust, would a court of equity suffer him to hold for his own use the land acquired by this kind of fraud? Although the trust in favor of C. could not be carried into effect because there would be no writing to manifest it, still the land thus acquired by fraud would be held in trust for the grantor, A., and a court of equity would compel B. to convey it back to A. In this case B. would be protected against the express trust in favor of C. by the statute of frauds; but the implied trust in favor of A., growing out of the fraud, is excepted from the operation of the statute. If this were not the case, the statute, which was intended to protect parties against fraud and perjury, would itself be an engine of fraud.

So, in the case under consideration, if it be true, as alleged, that the defendant obtained a conveyance of the testator's lands merely to act as agent for the sale of them, he cannot hold them for himself; and when he attempts to do so, a trust grows up in favor of the grantor by implication, which a court of equity will compel him to execute. (See Tiff. & Bull. Trusts and Trustees, 22–23; Groves' Heirs v. Fulsome *et al.*, 16 Mo. 543.)

But this is not a suit to compel the execution of the alleged trust. The amended petition merely states the trust by way of inducement, and then declares upon a stated account and seeks to recover the balance of this stated account. Viewed in this light,

it is an action at law for the recovery of money only, and was a proper case to be submitted to a jury.

The evidence tended to show that there had been a settlement, and one witness stated positively that the defendant told him that he had in his hands $16,000 of the money of Maddox, the testator, and Maddox had nothing to show for it. But the evidence was contradictory, both in regard to the trust and the stated account. There was, however, enough to support the verdict, and under the rulings so often made by this court we are not at liberty to disturb it.

Let the judgment be affirmed. The other judges concur.

L. B. SMITH *et al.*, Appellants, *v.* S. H. SMITH, Respondent.

1. *Equity — Bill to set aside conveyance — Land bought with money of wife — Husband's consent, etc.* — The husband has a right, if he chooses, to give real estate to his wife, although paid for entirely by himself, and his consent that she shall receive the deed to herself will show his intention in that regard. But in the absence of any proof of such intent, if it shall appear that the property is purchased with the money of the wife, whether her sole and separate estate, or simply assets which the husband had the power to appropriate to his own use, the wife should not be divested of it. The husband's consent will be presumed, and even without it the title is properly in the wife.

Appeal from St. Clair Circuit Court.

Burdett, *Smith* and *Mead*, for appellants.

I. The personal property of the wife at the time of her marriage is thereby vested absolutely in the husband, and so with her choses in action reduced to possession during coverture. (See 2 Kent, 129, 143; Reeves Dom. Rel. 49; Sallee v. Arnold, 32 Mo. 532, and cases cited.)

II. The husband is entitled to the whole of the earnings and savings of the wife during coverture (1 Pars. Cont. 345 and note *x*, and authorities there cited; Reeves Dom. Rel. 139), and he is so entitled in equity, although they live separate from each other, and even if it be savings from her separate property or

from an allowance made her by him. (Prescott v. Brown, 23 Me. 305; Washburn v. Hale, 10 Pick. 429.) And this doctrine obtains in equity, even where the husband lives separate from the wife and in adultery with another woman, and permits his wife to carry on business in her own name and for herself. (Russell v. Brooks, 7 Pick. 65; 1 Kinne's Law Comp. 453.)

Foster P. Wright, for respondent, cited Tennison v. Tennison *et al.*, 46 Mo. 77; also Putnam v. Bicknell, 18 Wis. 333; Wallingsford v. Allen, 10 Pet. 594; Slanning v. Style, 3 P. W. 334; Deming v. Williams, 26 Conn. 226.

BLISS, Judge, delivered the opinion of the court.

The plaintiffs are the heirs of Lockwood W. Smith, deceased, and the defendant was his wife. In 1858 the said Lockwood W. Smith purchased of one Gentry 520 acres of land in St. Clair county, for which he paid $2,000 down, gave his two promissory notes for $750 each, and took a title bond. In 1859 the first note was paid, and in 1865 the defendant, without her husband, went to said Gentry, paid him the balance due on the land, and pursuaded him to convey the property to her. The husband died without issue, and this suit is brought by his collateral heirs to set aside the conveyance as obtained by fraud, and vest the title in them.

In answer to the petition, which charges that all money paid belonged to the husband, that he never consented that his wife should receive the deed in her own name, and that she obtained it by false representations, she answers, and supports her answer by her subsequent testimony, that all the property of the family belonged to her, that she married her husband in New Orleans, and was worth at that time several thousand dollars and he was worth nothing; that they moved to Aspinwall, in Central America, where she kept hotel in her own name, her husband being sick, and the profits, under the laws of the place, became her own; that the $2,000 originally paid belonged to her, and from her earnings in Aspinwall she paid the balance, and in the meantime supported her husband, who spent most of his time in New York endeavoring

to regain his health. She also averred and testified that she took the deed to herself by her husband's consent, although he was not present.

The husband had a right, if he chose, to give the property to his wife, although paid for entirely by himself, and his consent that she should receive the deed to herself would show his intention in that regard. And in the absence of any proof of such intent, if it should appear that the property was purchased with the money of the wife, whether her sole and separate estate or simply assets which the husband had the power to appropriate to his own use, we would not divest her of it. His consent should be presumed, and even without it the title would be where it justly belonged and should not be disturbed.

I have carefully examined all the evidence, and am satisfied that the money with which the property was purchased never belonged to the wife, and that the husband never consented that the land should be conveyed to her. To arrive at this conclusion her testimony must be discredited, and I find it so improbable in some things, and so contradicted in material parts, that I am constrained to give it but little credit. It appears that one Hill was in some way connected with them in Aspinwall, and upon one of her visits to her husband in New York she persuaded him to sell the Missouri land to said Hill for $4,000. She desired him to execute a deed for her to take back, which he was very reluctant to do without the money, fearing, as he said, that he might thus be robbed of everything he had. She persuaded him that it would be perfectly safe, and promised to remit the money directly to New York. A correspondence ensued in regard to the money, in which she made contradictory statements; never, however, claiming the money as her own, but promising to send it to him. His letters are not produced. The money was never sent, but this Mr. Hill conveys the land to her, for which she says she paid him $4,000. It is with this deed, but without the title bond, that she persuaded Gentry to make her a conveyance; although she also told him at the time that her husband had given her a power of attorney to receive the deed, which power, however, has never been produced. There is reason to suspect that the sale to Hill was a *ruse* to obtain

the title through him for herself, and that she afterwards found that a deed from Gentry was necessary. Her testimony that the property was all hers is contradicted by evidence of her admission that she was poor at her marriage, and that some time after her husband showed his friends a large bag of gold in her presence, both agreeing as to the manner in which he had earned it. She is also contradicted in relation to the original purchase, she testifying that she bought the land, while Gentry swears that it was purchased and paid for by the husband. She supports her testimony by exhibits of several monthly receipts given to her in Aspinwall for rent of the hotel and for liquors bought at different times. These receipts show that in her husband's absence his wife did the business, which is not inconsistent with his ownership of the property.

The record shows other reasons for the conclusion which I have arrived at, and I think the plaintiffs are entitled to a judgment. The interest of defendant as wife will not of course be affected by it, and I think the cause should be remanded, that a judgment may be agreed upon that shall make it unnecessary for her to petition for her interest as wife. The other judges concur.

THE STATE OF MISSOURI, Respondent, *v.* C. M. SHERMAN, Appellant.

1. *Criminal law — Dram-shop license — County Court — Indictment.*—Where a town charter contains nothing which excludes the right of the County Court to demand a license for selling liquor from the keeper of a dram-shop, he is not protected from indictment by a town license, but must also take one out from the County Court.

Appeal from Henry Circuit Court.

J. La Due, for appellant.

W. N. Pickerill, Circuit Attorney, and *A. J. Baker*, Attorney-General, for respondent.

ADAMS, Judge, delivered the opinion of the court.

The defendant was indicted and convicted for selling intoxicating liquors as a dram-shop keeper without a license from the County Court. The place of sale was in the town of Clinton, Henry county, and the defendant set up as a bar to the indictment a license which had been issued to him by the town authorities. There is nothing in the charter of the town which excludes the right of the County Court to demand license. In such case the defendant is not protected by the town license, but must also take out a license from the County Court. This is the settled law of this State. (See Harrison v. The State, 9 Mo. 526; Austin v. The State, 10 Mo. 595.)

Judgment affirmed. The other judges concur.

A. HENRY, Plaintiff in Error, *v.* JOHN ATKISON, Defendant in Error.

1. *County, commissioner of — Deed by — Construction of statute.* — A deed made by a county seat commissioner need not recite the authority of the officer. If it appear on the face of the instrument that it was made by him as commissioner, the requirement of the statute (Wagn. Stat. 397, § 14) is met.

Such a conveyance can only be a quit-claim deed; and a covenant of warranty would not bind the county.

Error to Bates Circuit Court.

F. P. Wright, for plaintiff in error.

Ewing & Smith, with *Bassett*, for defendant in error.

ADAMS, Judge, delivered the opinion of the court.

This was ejectment for a lot in the town of Butler, the county seat of Bates county. The plaintiff claimed title by virtue of a deed executed to him by the county seat commissioner of Bates county, which was excluded by the court, and judgment given in favor of the defendant.

David McGaughey was the commissioner, and there was no dispute that he had authority to make the deed. The only objection was that the deed did not recite the authority. The deed on its face appears to be made by him as commissioner, and that is all that the statute requires. (Wagn. Stat. 397, § 14.)

The deed operates as the execution of a statutory power, and can convey only such interest as the county had in the lots. Any warranty in the deed would not bind the county, as the commissioner had power only to convey the interest of the county and not to make warranties. I think the deed is a substantial compliance with the statute and ought not to have been rejected.

Let the judgment be reversed and the cause remanded. The other judges concur.

SAMUEL D. PEARCE *et al.*, Plaintiffs in Error, *v.* A. W. McCLANAHAN *et al.*, Defendants in Error.

1. *Practice, civil—Motion to strike out—Final judgment.*—The action of the Circuit Court in sustaining a motion to strike out plaintiff's petition, is not a final judgment from which a writ of error lies.

Error to Bates Circuit Court.

Bogges and *Sloan*, for plaintiffs in error.

Wm. Page, for defendants in error.

ADAMS, Judge, delivered the opinion of the court.

This was an action by attachment. After commencing their suit plaintiffs filed an amended petition, and the defendant filed a motion to strike it out, which motion was sustained and a bill of exceptions filed. The defendants have filed a motion to dismiss the writ of error, because there was no final judgment. The action of the Circuit Court in sustaining the motion to strike out was not a final judgment from which a writ of error lies.

The writ of error is dismissed. The other judges concur.

STATE OF MISSOURI *ex rel.* ALFRED CASE *et al.*, Plaintiffs in Error, v. M. W. SEARL *et al.*, Defendants in Error.

1. *Schools, organization of by towns — Construction of statute.* — Under section 1 of article II of the act touching schools (Wagn. Stat. 1262), especially when taken in connection with article I, section 1 of the same act, cities, towns or villages can organize for school purposes without including in such organization the whole sub-district to which it previously belonged.

Error to Laclede Circuit Court.

R. P. Bland and *G. W. Bradfield*, for plaintiffs in error.

W. J. Wallace, *J. P. Nixon* and *H. H. Harding*, for defendants in error.

WAGNER, Judge, delivered the opinion of the court.

This was an information in the nature of a *quo warranto* filed in the Circuit Court at the instance of the relators, who were school directors for sub-district number 1 of township 34, range 16, in Laclede county. The information charged the defendants with usurping and unlawfully exercising the powers conferred in certain cases by the act of the Legislature, approved March 21, 1870, concerning schools (Wagn. Stat. 1262, § 1), and averred that the defendants were, without authority of law, acting as school directors for the town of Lebanon, the same being a part of said sub-district number 1.

The return of the defendants set up their right to act by virtue of an organization of the town in pursuance of the act before referred to, and alleged that the town of Lebanon and all its additions, at an election held for that purpose, adopted the law; that the defendants were afterwards duly elected as a board of education for said town, and were, by virtue thereof, lawfully exercising said authority. To this return a replication was filed. Upon this state of facts the relators asked the court to declare the law to be that the town had no lawful right or power to organize for school purposes, without including in such organization the whole sub-district. The court refused so to declare the law, and gave judgment for the defendants.

The only question presented in the record for our determination is the one indicated by the instruction, namely: whether any city, town or village can organize for school purposes without including in such organization the whole sub-district to which it previously belonged. The law under which the town acted was adopted in 1870, and is as follows: Any city, town or village, the plat of which has previously been duly filed and recorded in the recorder's office of the county wherein the same is situate, together "with the territory attached, or hereafter to be attached, to said city, town or village, for school purposes, may be organized into and established as a single school district, in the manner and with the powers hereinafter specified." (Wagn. Stat. 1262, § 1.) It must be conceded that the section is somewhat obscure, and the meaning of the words "with the territory attached" is not very definite or manifest. But, considering the whole subject and the object had in view in its enactment, we do not think it will bear the construction sought to be placed upon it by the plaintiffs. If the town or village could not organize without including the entire sub-district as it had previously existed, the main purpose of the law would be defeated. Sub-districts sometimes comprehend a large scope of territory, and towns rapidly increasing in population need and require a school-house within their limits. These school-houses would be inaccessible to the greater portion of the country, and the country schools would wholly fail to accommodate the towns. The very object and purpose of the law-makers, as expressed in the title of the act, was to enable or authorize cities, towns and villages to organize for school purposes with special privileges.

By reference to the statute (Wagn. Stat. 1241, § 1) it will be seen that in certain instances a single sub-district may comprise within its limits the greater part of an entire congressional township, and it could never have been intended that a whole sub-district outside of the town limits should be considered as territory attached. A town containing a majority of the voters would be able to extend an organization, designed specially for itself, over an entire sub-district, however remote its parts, and regardless of the wishes or interests of those who, from location or otherwise,

could derive but little benefit from the organization. Under these town organizations bonds are authorized to be issued on the credit of the town for the erection of school-houses, and the construction contended for by the plaintiffs would tax the people, who could derive little or no benefit therefrom, for the building of costly edifices and carrying on expensive schools. Moreover, the section in the statute last referred to declares, in explicit terms, that nothing contained in the law shall be so construed as to give the township board of education, or to local directors in sub-districts, jurisdiction over any territory in the township included within the limits of any city, town or village, with the territory annexed thereto, for school purposes.

Upon a review of the whole question, we cannot see that the court in its decision committed any error.

Judgment affirmed. The other judges concur.

JOHN COSGROVE, Respondent, *v.* THE TEBO & NEOSHO RAILROAD COMPANY, Appellant.

1. *Practice, civil — Pleading — Notes — Suit brought on as upon account — Judgment must be at next term.* —In an action to recover the amount named in certain certificates of indebtedness, where the petition, instead of declaring directly upon the certificates as notes, set forth a cause of action in account for work and labor done and performed, and referred to the certificates merely as evidence and as exhibits, plaintiff would have no right — answer having been filed — to take judgment at the return term.

Appeal from Cooper Circuit Court.

Hayden & Tompkins and *Adams & Son*, for appellant.

John Cosgrove and *J. W. Draffin*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The cause of action in this case arose under the statute giving laborers the right to sue a railroad company when the contractor fails to pay them. (Wagn. Stat. 302, § 10.)

The suit was brought by the plaintiff against the defendant on twenty-four separate accounts assigned to him by laborers on the road. The sole question arising on the record, and which is assigned for error, is the action of the court in proceeding with the trial and giving judgment at the return term. To this the defendant objected, and upon the objection being overruled it abandoned the case.

After the requisite notice was given, the sub-contractor gave to each of the laborers a paper stating that a certain amount was due him; these evidences of debt were transferred and assigned to the plaintiff. These evidences of debt, it is contended by the plaintiff, were in the nature of notes for the direct payment of money, and would authorize a judgment at the first term on a petition founded upon them. But this position is hardly correct. The papers given by the sub-contractor were not the notes of the company. Without undertaking to decide, however, what their precise character may be, it is sufficient to say that in this case they were not declared upon as notes or any other instruments for the direct payment of money.

The petition set out a cause of action in account for work and labor done and performed, and the certificates of indebtedness given by the sub-contractor were simply referred to as evidence and exhibits. The case comes within the decision of Smith v. Best, 42 Mo. 185. The plaintiff elected to declare upon the original cause of action and bring his petition upon an account, and he must therefore abide by the rules of pleading in such cases. When the answer was filed the law continued the case till the next term for trial. Wherefore the judgment will be reversed and the cause remanded. Judge Bliss concurs. Judge Adams not sitting.

JAMES W. NORVELL, Respondent, *v.* WM. C. DEVAL, Appellant.

1. *Jury, removal of, from one county to another.*—A court has no right to have a jury carried from one county to another.
2. *Jury — Session after adjournment.*—A court has no authority to have a jury in session after the adjournment of the court to a distant day.
3. *Jury —No verdict in case of insanity.*—If, after a jury is sworn, one of them is rendered incompetent by insanity or otherwise, no verdict can be rendered and a new jury must be ordered.
4. *Jury — Verdict, etc.*— The jury must all be in court when the verdict is rendered.
5. *Jury, polling of — Signing of verdict.*— Either party has the right to poll a jury. It makes no difference whether the verdict is signed by all the jurors or only by the foreman.

Appeal from Phelps Circuit Court.

R. P. Bland and *A. J. Seay*, for appellant.

Ewing & Smith, with *Pomeroy*, for respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action for assault and battery, commenced in Crawford county, and taken to Phelps county by change of venue because the judge had been of counsel in the case. The plaintiff was an infant when the suit was commenced, and a next friend was appointed for him without a regular petition. But during the pendency of the suit he became of age, and on motion was allowed to prosecute his suit as an adult, and, as such, filed an amended petition to which the defendant filed an answer, justifying the assault and battery on the ground of self-defense.

The case was submitted to a jury on the 9th of April, 1870, on which day the court made an order of record that if the jury did not agree, the sheriff should keep them in custody, and on the 11th of April, 1870, convey them to Waynesville, Pulaski county. The court adjourned on the 9th of April till the 24th of May, 1870, and the jury found a sealed verdict which was signed by all the jurors, and retained till the court met, on the 24th of May. In the meantime one of the jurors became insane and had

been sent to the lunatic asylum, and only eleven jurors appeared in court when the sealed verdict was opened and delivered to the court. The verdict was for five dollars damages in favor of plaintiff. The defendant asked that the jury might be polled, but the court refused permission to poll the jury because one of them was absent and insane, and the defendant excepted. The defendant filed motions for new trial and in arrest, which were overruled and final judgment rendered against him, from which he has appealed to this court.

The only material question in this case is as to the validity of the verdict. The court had no right to have the jury carried from one county to another. This has never been the practice in this State, and ought not to be allowed. The entry of the order for removal amounted to nothing, as it was not carried out.

It seems to me that a court has no authority to leave a jury in session after the adjournment of a term to a distant day. As long as a judge remains as the head of the court he may keep the jury in session. But when the court adjourns over, and he is no longer head of the court, how is a jury to be kept as a constituent part of the court when there is no court in session?

A court may be adjourned from day to day, or for several days, but if the jury is retained at all it is also adjourned over as part of the court. But even if the practice were right, only eleven jurors appeared when the court met on the 24th of May. A jury in a court of record must consist of twelve men. If, after a jury is sworn, one of them dies or is rendered incompetent by insanity or otherwise, no verdict can be rendered, and a new jury must be ordered. They must all be present in court when the verdict is rendered. This has always been the universal practice, and it would be dangerous to the rights of litigants to adopt any other rule. Either party has the right to poll the jury. It makes no difference whether the verdict is signed by all the jurors or only by the foreman. The parties have the right to know of each juror whether the verdict rendered is his, and this can only be done by polling the jury before they are discharged. The verdict is not perfect till it is delivered to the court by the jury in the presence of all of them. The verdict in this case ought not to have been

received from the eleven jurors. The proper course would have been to discharge the jury on account of the insanity of one of them, and let the case be tried by another jury.

The judgment must be reversed and the cause remanded. The other judges concur.

NATHANIEL T. ALLISON, Plaintiff in Error, *v.* NATHANIEL SUTHERLIN *et al.*, Defendants in Error.

1. *Principal and surety, payment by — Subrogation, etc.* — A surety for the payment of part of the indebtedness of his principal, by paying that sum becomes entitled to a *pro rata*, or proportionate share, with the other creditors, of the proceeds arising from the sale of the debtor's property, and for that purpose may be subrogated to all the rights of the remaining creditors, so as to have the benefit of all the securities which they had.
2. *Trusts and trustees — Agreement — Expiration of time named in — Creditor unpaid, rights of.* — Where a trustee was created by a certain agreement to sell the property of the debtor and distribute the proceeds among the creditors, and by the terms of the instrument the trust was to continue only two years, a creditor omitted from the general distribution may recover his portion of the proceeds, although the time limited has expired.

Error to Cooper Circuit Court.

E. B. Adams and *Thomas B. Wright*, for plaintiff in error.

Allison, having paid the entire debt for which he was surety, was, under the rules of equity, entitled to be subrogated to the rights of the creditors who held these debts, and to have the benfit of the lien, and the moneys arising therefrom, held by them for the payment of said debts so paid by him as surety. (See 8 Mo. 169, 413; 18 Mo. 136; 23 Mo. 447; 35 Mo. 99; 38 Mo. 281, and authorities in these cases cited.)

Draffin & Muir, for defendants in error.

A surety for a part of a debt is not entitled to the benefit of a security given by the debtor to the creditor at a different time, in a distinct transaction, for another part of the debt. (See Wade v. Coope, 2 Sim. 155; 1 Lead. Cas. Eq., 3d Am. ed., 143.) The right of the surety, on payment of the debt of his principal,

to be subrogated to the place and rights of the creditor, is subordinate to the rights of the creditor and does not exist when the interests of the creditor would thereby be sacrificed; that is, the surety in such case, before he can equitably demand substitution, must discharge the whole debt secured by the liens sought to be made available to reimburse himself. (Dixon Subr. 106, 122–4; Mathews v. Switzler, 46 Mo. 301.) Subrogation is the creature of equity and will never be enforced against the superior equities of third persons, nor to the prejudice or injury of the creditor, and, therefore, not until the creditor is fully paid and satisfied. (1 Am. Lead. Cas. Eq. 161, and authorities cited.)

WAGNER, Judge, delivered the opinion of the court.

From the record in this case it is shown that the defendant Sutherlin was indebted to the banking house of Wm. H. Trigg & Co., by various, distinct and separate promissory notes, on three of which, amounting in the aggregate to about $1,800, the plaintiff Allison was surety. These three notes, together with the other notes, amounted to about the sum of $9,500. The banking house, for purposes of collection, transferred all these debts to William H. Trigg. The other defendants herein, together with Trigg, constituted the banking house. On each of the debts so held by Trigg separate judgments had been obtained in the Cooper Circuit Court. Some of the debts were for other parties, although standing in the name of the banking house. Executions were issued on all the judgments, returnable to the March term, 1864, of the Circuit Court, and these executions were levied on all of the real estate of the defendant Sutherlin, consisting of several thousand acres of land. One H. C. Levens also held a demand against Sutherlin, amounting to about $1,200, which was secured by deed of trust on some of Sutherlin's real estate; but the liens of the judgments in favor of Trigg had priority over the deed of trust.

Under the judgments the real estate of Sutherlin was advertised to be sold, and on the day of sale the defendant Sutherlin and his surety, Allison, the plaintiff here, and the creditors met at the sale; and as it was war times and there was great excitement in

the country, it was agreed by all parties interested that it would not be best to sacrifice the lands by making the sale, but to let Trigg buy them in for a nominal sum, and hold them in trust to be sold at a more suitable time, and the proceeds of the sale to be applied ratably to each of the debts. Under this arrangement made at the time of the sale Trigg bought in the lands at a nominal price, and a few days afterwards executed a writing manifesting the trust, which reads as follows: "Articles of agreement witnesseth that, whereas, Wm. H. Trigg purchased at sheriff's sale, at March court, 1864, all the lands of Nathaniel Sutherlin, for description of which pieces, etc., reference is made to sheriff's report, sale and deed; and whereas, said Trigg purchased said lands in trust for the debts due the banking association of which he is a member, and others who had debts in his hands for collection, and for the debt due Henry C. Levens in the same proportion as the debt of said Levens bears to all said debts in the hands of said Trigg; now said Trigg, for himself and in behalf of all said beneficiaries and said Levens, hereby agrees to make sales of said lands, or such part thereof as they may deem proper to sell, and apply all proceeds of such sales to the payment of said debts *pro rata;* and when all said debts shall be fully paid off and discharged, if the same shall be done within two years from this date, and all interest and costs paid thereon, said Trigg shall sell and convey the residue of said lands, if any, to said Sutherlin, his heirs or assigns. The debts to said Trigg, as aforesaid, are about ninety-five hundred dollars, and the debt due to said Levens is about twelve hundred dollars; the precise amount of either is not ascertained. Given under hand and seal, this 15th day of March, 1864. WM. H. TRIGG. [Seal.]"

Trigg, under this trust, in connection with Sutherlin, who warranted the title, sold seven or eight thousand dollars' worth of these lands, leaving about 400 acres still unsold, and the amounts of these sales were paid over to the beneficiaries of the debts held by Trigg. Trigg then transferred to the defendants in this suit the balance of the lands, to be held and disposed of by them on the same terms and trusts. These parties accounted for and paid over to Levens his *pro rata* share of the money realized.

After these sales the plaintiff Allison, against whom, as surety for Sutherlin, judgment had been rendered on the notes as set forth in the petition, was compelled to and did pay off said judgments, amounting in all to about $1,800, which amount went also into the hands of the defendants, who refused to recognize the plaintiff as a beneficiary in the trust, and refused to account to him or pay over to him any part of the amount he was compelled to pay as Sutherlin's surety.

The plaintiff then brought this suit to be subrogated to the rights of the creditors under the said trust, and to compel them to account for and pay over to him a *pro rata* share of the moneys arising from the sales of the lands, and to have the remainder of the lands sold and appropriated under the trust, and his part of the proceeds paid over to him.

The case was submitted to the court on the facts as substantially set out above, and the court decided that the plaintiff was not entitled to recover.

The doctrine is well settled that as soon as a surety has paid the debt, an equity arises in his favor to have all the securities, original and collateral, which the creditor held against the person or property of the principal debtor, transferred to him, and to avail himself of them as fully as the creditor could have done for the purpose of obtaining indemnity from the principal. By paying the debt of the principal the surety becomes entitled to be subrogated to all the rights of the creditor, so as to have the benefit of all the securities which the creditor had for the payment of the debt, without any exception — as well those which become extinct at law, at least by the act of the surety paying the debt, as all collateral securities which the creditors held for the payment of it — which have not been considered as directly extinguished by the sureties paying the debt. (Furnold v. Bank of Missouri, 44 Mo. 336, and cases cited.)

We do not controvert the rule laid down in Wade v. Cooper, 2 Sim. Ch. 155, and in Matthews v. Switzler, 46 Mo. 301, the cases mainly relied on for the defendants in error, but we think that the facts in this case render it inapplicable. By the express terms of the trust the plaintiff was to be one of the beneficiaries.

It was made to cover the debt for which he was surety as well as the others. When he paid the debt, then he was entitled to a *pro rata* or proportionate share arising from the sale of the lands. He has satisfied the debt in full, and to allow the defendants to retain that amount in full and then keep the balance that the land brings would be to permit them to receive payment twice, which is wholly contrary to the intentions of the trust, and would be a palpable fraud on the rights of the plaintiff.

The fact that the two years mentioned in the writing have expired cannot defeat or affect the plaintiff's rights in the premises. The trust continues until the whole matter is wound up and settled.

There are several hundred acres of land yet remaining unsold, and the plaintiff has a direct interest in seeing that they are disposed of to the best advantage, and he is entitled to his proportionate share of the proceeds.

We think the court erred in its decision, and the judgment will be reversed and the cause remanded. Judge Bliss concurs. Judge Adams, having been of counsel, not sitting.

JOHN P. THISTLE, TRUSTEE OF MARY H. THISTLE, Respondent,
WILLIAM H. BUFORD, Appellant.

1. *Estoppel — Privity of estate.* — Where the owner of land would be estopped, by reason of his own acts and conduct, from setting up title thereto, those in privity with him, (unless purchasers for value without notice,) labor under a similar disability.

Appeal from Johnson Court of Common Pleas.

Nickerson, Elliott & Blodgett, for respondent.

Hicks, Crittenden & Cockrell, for appellant.

BLISS, Judge, delivered the opinion of the court.

The plaintiff brings ejectment, and the defendant sets up and clearly establishes the following facts: The title was in Archibald Thistle, father of the plaintiff, who gave the land

to his son, John P. Thistle, but executed no conveyance. The latter entered into possession, made improvements, had the land listed in his own name, paid the taxes for several years, and exchanged the same with one Vickers for an equal quantity lying more convenient, each party executing conveyances and taking possession accordingly. During all this time Archibald Thistle treated the land as his son's and approved of the exchange. John P. Thistle had taken possession of the land as his own in 1857, and the exchange was made in March, 1860. In December, 1865, Vickers conveyed to defendant Buford; but in July previous Archibald, the father, had conveyed to John P. Thistle, in trust for his wife, Mary H., certain lands including the parcel in controversy, and died before the commencement of this suit. From his declarations before and after this conveyance there is reason to believe that he did not intend to embrace this land; there is no other way to relieve his memory from the charge of a deliberate and premeditated fraud. Previous to this conveyance in trust Buford had rented the Vickers land, including that in controversy, and in 1864 applied to Archibald, as agent of his son, to rent also his son's. Archibald Thistle then pointed out to him the lines, designating that exchanged and conveyed to Vickers, being the land now in controversy, as belonging to Vickers, and the land received in exchange as belonging to his son. Buford told him he would like to buy both Vickers' and his son's land, and asked him if the title was good. He was assured that it was perfectly good, and among other things the father explained that he himself had entered the land, had given it to his son, and his son had traded it to Vickers in order to straighten their lines. In the spring of 1865 Buford again rented the land belonging to John Thistle, and, keeping up his intention to purchase the Vickers property, again inquired in regard to the title to the land in controversy, of Archibald, who assured him that John could make a good title; and in 1866, after the purchase by Buford, and after the trust deed, he again went to Archibald Thistle, and told him there was a difficulty about the title to the land deeded by John to Vickers. Thistle replied that he need not be uneasy about it; that he had given it to John, who traded

it to Vickers; that it was not included in the trust deed to John's wife, for he had told the attorney who drew the deed to leave it out, and he would make John's deed good. In August, 1866, the said Archibald Thistle, apparently acting upon the supposition that his statement to Buford was true, executed to him a quit-claim deed of the land in dispute, reciting his gift to John and John's conveyance to Vickers. It is probable that the father acted in good faith and did not design to enable John and his wife to perpetrate a fraud upon defendant. John Thistle also uniformly, after his conveyance to Vickers, treated the land as sold, described it to defendant as Vickers' land, and made no claim to it until just before the commencement of this suit, when a difficulty had arisen in regard to his right to dig coal.

It is also shown that before the exchange of the lands John P. and his wife had been in possession of the land so conveyed to Vickers some four or five years, and claimed it as their own, and also before as well as after the trade, the said Archibald said the land was John's, and that he entered it for him; that he was present when the trade was made and before the deeds were executed, and approved it, saying that it was a good thing for his son and Vickers to make it, as it would save fencing, etc.

The plaintiff possesses the legal title in trust, etc., and his counsel have with much ingenuity interposed many considerations why, as trustee, he should not be estopped from asserting it. But it should first be noted that the *cestui que trust* has no special equity. She is not a purchaser for a valuable consideration, no part of her estate has gone into these lands, and the moving inducement to the gift was her relationship to John P. Thistle and his father. That they or either of them would be estopped from asserting title, cannot be doubted. John is estopped by his conveyance to Vickers; and had the conveyance to his wife's use been to his own use, it would have inured to the benefit of his grantor. Archibald Thistle induced Vickers to exchange with John P. by calling the land John's and making Vickers believe it was his, and his continued assertion that it belonged to John induced the defendant to buy of Vickers. There can be no plainer case for the application of the doctrine of estoppel *in pais*, were

he himself, without having made any conveyances, the plaintiff in this action. Those in privity, unless purchasers for a good consideration without notice, labor under the same disability. (Shew v. Beebe, 35 Verm. 205; Snodgrass v. Ricketts, 13 Cal. 359; 2 Smith's Lead. Cas. 756.). The beneficiary, then, of the trust deed under consideration, cannot avail herself of the attempt to defraud the defendant. The disability of the voluntary grantor to her use binds her as well.

The judgment of the court is reversed and the petition dismissed. The other judges concur.

SAMUEL E. SHAW, Appellant, *v.* DANIEL POTTER, Respondent.

1. *Practice, civil — Instructions, exceptions to.* — Instructions not excepted to in the lower court will not be reviewed in the Supreme Court.
2. *Sheriff's deed — Purchase-money — Deed — Vendor.* — *Semble*, that the delivery of a sheriff's deed and the payment of the purchase-money by the vendor are concurrent acts. The latter is not bound to part with his money until a deed for the premises is tendered.
3. *Sheriff's sale — Sheriff agent of both parties — Duties of at sale.* — An officer selling property under execution is the agent of both the plaintiff and defendant, and he is bound to protect the interests of all parties concerned, and is not bound to accept a bid without reserve. If he can see that a sacrifice of property will be prevented by reasonable delay, he may return "no sale" for want of bidders; and especially so on a re-sale, when the time and circumstances are such as to prevent a reasonable competition. (Conway v. Nolte, 11 Mo. 74.)

Per ADAMS, Judge.

4. *Sheriff's sale — Purchaser — Deed — Payment.* — The purchaser at a sheriff's sale must pay the purchase-money before he can demand his deed.

Appeal from Dade Circuit Court.

Nathan Bray, for appellant.

Shafer & Duckwall and *J. S. Phelps*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff, who was sheriff of Dade county, filed his motion in the Circuit Court under the provisions of the statute in relation to executions (R. C. 1855, p. 747, § 49), to recover of defendant

the difference between the price bid by him for certain lands sold by the plaintiff, as sheriff on execution, and the price which the same brought at a re-sale; it being alleged by the plaintiff that the defendant refused to take the land and pay the purchase-money bid by him.

On the trial there was evidence going to show that immediately after the sale, defendant called upon the sheriff and notified him that he was ready to pay the price bid by him and accept a deed, when he was told by the sheriff that he was too busy to make the deed, and that he could pay the money at some other time. Defendant then went home and did not return during the session of the court, and on the last day of the court, between four and five o'clock, the sheriff re-sold the land at a great sacrifice, and executed a deed therefor to the last purchaser. Defendant subsequently tendered the money and demanded a deed, which the sheriff refused.

The plaintiff asked two instructions which the court refused, and to which refusal exceptions were taken. Three instructions were given by the court for the defendant, but no exceptions were taken to them. Verdict and judgment for defendant.

The first instruction offered for the plaintiff asked the court, in substance, to declare that where lands are sold at sheriff's sale, and the money is not paid by the purchaser, the sheriff is not bound to hunt up the purchaser to make a demand of the price bid; and if the purchaser leaves the court and goes home, and does not return during the term, and fails to pay the full amount of his bid, it is a refusal to pay within the meaning of the law, and the sheriff may again, without re-advertising, sell the land, and the first purchaser will be bound to pay any deficit there may be between the first and the last bid. The second instruction was to the effect that a great difference between the prices of the first and last sales, where the first purchaser refused to pay the amount of his bid, was no excuse why the first purchaser should not pay the difference when the sale was conducted fairly and openly.

The first instruction given at the request of the defendant declared that before a sheriff could collect a deficit under the law, he must show a refusal to pay by the original purchaser before

the subsequent sale took place by which the loss or deficit occurred. The second declaration was, in substance, that where a purchaser of real estate at sheriff's sale offered to pay the amount of his bid, and demanded a deed, and the whole matter was deferred or delayed indefinitely, at the request of the sheriff, the sheriff could not afterwards re-sell the real estate until he should have made a demand and there had been a refusal on the part of the purchaser to pay for the property. The third instruction declared that an officer selling property under execution is the agent of both the plaintiff and defendant, and he is bound to protect the interests of all parties concerned, and is not bound to accept a bid without reserve. If he can see that a sacrifice of property will be prevented by reasonable delay, he may return "no sale" for want of bidders; and especially so on a re-sale, when the time and circumstances are such as to prevent reasonable competition.

As the defendant's instructions were not excepted to, they will not be reviewed here, though, when applied to the evidence as preserved in the bill of exceptions, we see nothing objectionable in them.

The first instruction asked by the plaintiff was rightly refused, as it ignored the evidence in regard to the permission of the sheriff for the purchaser to retain the money until some other time. The statute requires that before the sheriff will be authorized to re-sell the property the purchaser shall refuse to pay the price bid. What will amount to a refusal will depend upon the facts and circumstances in the case. Whether the purchaser is bound to pay before a tender of a deed is a question upon which there is a conflict in the authorities. In Pennsylvania it is held that it is not necessary, in a suit against a purchaser of land at sheriff's sale, brought to recover the purchase-money, to aver a tender of a deed acknowledged. Unless other conditions are specified, it is a cash sale, and the delivery of the deed is an act subsequent to the payment of the money. (Negley v. Stewart, 10 Serg. & R. 207.) But in other States the doctrine is announced that the sheriff, upon such a sale, is required to make and tender a deed to his vendee; that it is a duty which is purely ministerial,

and he may not omit its performance; that the delivery of such a deed and the payment of the purchase-money are to be concurrent acts, and that the vendee is not bound to part with his money until a deed for the premises is tendered. (The State v. Lines, 4 Ind. 351; 8 Blackf. 105; 7 Blackf. 46; 8 Johns. 520.) I am inclined to concur with this latter view, though the point is unimportant, as the court found that payment at the time was waived by the sheriff.

This fact being found, it is unnecessary to consider the plaintiff's second instruction, though we are not prepared to say that it was entirely correct. The third instruction given for the defendant was in the very language of this court in Conway v. Nolte, 11 Mo. 74, and enunciated the proper rule.

With the concurrence of the other judges, the judgment will be affirmed.

Per ADAMS, Judge.

I concur in the above opinion, but think that the purchaser must first pay the purchase-money before he can demand a deed.

CHARLES E. KEARNEY *et al.*, Defendants in Error, *v.* SAMUEL D. VAUGHAN *et al.*, Plaintiffs in Error.

1. *Contracts — Specialty — Attorney in fact — Execution — Equity.*— An agreement under seal by an attorney for a principal, although inoperative at law for want of a formal execution in the name of his principal, is binding in equity if the attorney had authority.
2. *Chancery, court of — Sale of estate of minors not a nullity.*— Chancery proceedings to sell the estate of minors, although instituted prior to the act of 1861 (Sess. Acts 1860-1, p. 98), were not void in the sense of being a nullity, even if the court went beyond its powers. Chancery courts have always had jurisdiction over the estates of minors. And if they exceed their powers under the law, such excess is not a naked assumption of power, as might be the case if the tribunal had no jurisdiction. Their action in such cases not being a nullity, but, if void, only relatively so, strangers cannot disregard it.
3. *Equity — Purchasers, innocent.*— A purchaser of land who buys of one who, as he supposes, has the legal title, but who informs him that even if it be so, he does not own the property and makes no claim to it, and for a nominal consideration obtains from him a quit-claim deed, cannot be called an innocent purchaser, and cannot be protected either in equity or under the registration act.

Error to Kansas City Court of Common Pleas.

W. Hough, for plaintiffs in error.

I. A court of equity has no inherent power to sell infants' real estate. (Field v. Moore, 19 Beav. 176; Calvert v. Godfrey, 6 Beav. 97; Forman v. Marsh, 1 Kernan, 551; Wood v. Mather, 38 Barb. 484; Vowles' Heirs v. Buckman, 6 Dana, 466; Williamson v. Berry, 8 How. 556.)

J. E. Merryman and *Karnes & Ess*, for defendants in error.

"The court of chancery had inherent jurisdiction, independently of the statute, to order the sale of the equitable interests of infant plaintiffs." (Inwood v. Twyne, 2 Eden's Ch. 153; Wood v. Mather, 38 Barb. 482.)

Whenever an encumbered estate devolves on an infant and a sale is demandable by a third person, the court of chancery may order its sale on petition of the infant. (Adams' Eq. 642–4; Snover *et al.* v. Snover, 2 Green, N. J., 85; *Ex parte* Salisbury, 3 Johns. Ch. 347; Hedges *et ux.* v. Riker *et al.*, 5 Johns. Ch. 163 *et seq.*; Field v. Schieffelin, 7 Johns. Ch. 154; Monday v. Monday, 1 Ves. & B. 223; Williams v. Harrington, 11 Ired. 620–1; Ashburton v. Ashburton, 6 Ves. Ch. 6.)

II. The acts of these infants in procuring the order to sell are at farthest only voidable, not void. (2 Kent, 252, 253, note; Gates v. Kennedy, 3 B. Monr. 167; Moore's Heirs v. Moore, 12 B. Monr. 651; Valle's Heirs v. Fleming, 29 Mo. 163–4; Ferguson *et al.* v. Bell's Adm'r, 17 Mo. 351.)

Bliss, Judge, delivered the opinion of the court.

The plaintiffs claim lot 243 in Old Town, now Kansas City, and show that in 1847 the "Old Town Company," consisting of John C. McCoy and others, were the proprietors of this and other lots; that they appointed Pierre M. Chouteau their attorney in fact to sell and convey said lots; that Ezekiel Huffman purchased this lot, and that said Chouteau undertook to convey him the same, but by a deed defective in this: that it recites that the

indenture was made and entered into by and between the said Chouteau as attorney in fact of the owners (naming them) of the first part, and said Huffman of the second part, and was signed and acknowledged by said Chouteau, who, however, attests that he executed it "as attorney in fact as aforesaid." The plaintiffs claim through this deed, and that, although it did not technically convey the legal title of the proprietors, yet, as they received the consideration, and the instrument was intended as a conveyance — the said attorney in fact being regularly authorized to sell and convey — equity will correct the error and execute the power; and this is the principal object of the proceeding. Of this there is no question, unless a subsequent equity intervenes. "An agreement under seal by an attorney for a principal, inoperative at law for want of a formal execution in the name of the principal, is binding in equity if the attorney had authority." (1 Am. Lead. Cas. 608, and cases cited.) We must consider that the consideration was paid for it, was so recited in the instrument, and the contrary was not shown; and also that Chouteau was empowered to sell and convey, for so the power of attorney reads, notwithstanding he testifies that the owners usually sold and he conveyed.

The chief controversy upon the trial arose, first, upon the right of the plaintiffs to the property as claiming under Huffman; and, second, upon the equities of defendants as innocent purchasers.

1. The evidence shows that Huffman, in 1848, conveyed to Burnett Scott, who took possession and made some improvements upon the lot. He went to California in 1849 and died. A record of a partition suit among the heirs of Scott was read and objected to by defendants for alleged irregularity, by which this lot was assigned to the widow as dower; but it cuts no figure, as plaintiffs' title is derived from the heirs by a subsequent proceeding. This proceeding was a petition in 1859 for a sale of the property filed in the Court of Common Pleas by the widow and her then husband, Thomas Miller, and the guardians of the Scott heirs. This decree for sale was made before the passage of the act of 1861 (Sess. Acts 1860–1, p. 98), the substance of which was embodied in the General Statutes, authorizing Circuit Courts to order the

sale of the real estate of minors, and the proceeding could not have been founded on that statute. Under some circumstances, however, it has been held that a court of equity will order the sale of the real estate of minors, though it is not supposed that the general power exists independently of statute. If this were a proceeding by the heirs to recover their property notwithstanding the sale, it would be necessary to scrutinize it, to examine the authority of the court to order it, and to see whether it could be sustained. But the defendants have no interest in that question; the heirs are not contesting, they are not made parties, and may be satisfied with the sale and be willing to abide by it. They are not concluded by the plaintiffs' judgment, and so far as this case is concerned we are at liberty to treat the sale as having passed title to the plaintiffs.

Counsel cite authorities to show that chancery proceedings to sell the real estate of minors are void, and that such minors, when arriving of age, may repudiate them and recover the property sold, and insist that if void they are a nullity, and cannot be treated as valid for any purpose.

It is, perhaps, unfortunate that we are not supplied with a term of more precision than the word "void," a word more often used to point out what may be avoided by those interested in doing so than to indicate an absolute nullity — a proceeding or act to be disregarded on all occasions. Of the latter class we might instance a common-law judgment rendered by a town council or County Court, or a conveyance by a stranger to the title while the real owner is in possession under a record title. But many things are called void which are not *absolutely* so, and, as to mankind generally, are treated as valid. They can only be called *relatively void*. For instance, conveyances, assignments, etc., in fraud of creditors, are declared by the statute to be void as to such creditors, and yet they become perfectly good unless attacked by such creditors; and if they shall fail to attack them for the period fixed by the statute of limitations, they become absolutely valid. And so no such deeds are called void in favor of *bona fide* purchasers. (47 N. H. 542; 18 Johns. 514.) Spencer, J., in Anderson v. Roberts, 18 Johns. 527–8, makes the term "void"

mean but voidable under some circumstances, and says "a thing is void which is done against law at the very time of doing it, and when no person is bound by the act; but a thing is voidable which is done by a person who ought not to have done it, but who nevertheless cannot avoid it himself after it is done." This distinction may not be complete, but is sufficient to show that the term "void," even when used in the statute, does not necessarily mean an absolute nullity. So, in a contract for the sale of land or for a lease, it is common to insert a clause that the instrument shall be void in certain contingencies, yet it remains perfectly valid unless the provision is taken advantage of by the vendor or lessor.

The force of this term is learnedly discussed in Pearsoll v. Chapin, 44 Penn. St. 9, and many instances are there given and authorities cited to show that it is used loosely and indefinitely both in statutes and by courts, and does not usually mean that the act or proceeding is an absolute nullity. (See also Mitchell v. Parker, 25 Mo. 31.)

The chancery proceedings now under consideration cannot be considered a nullity, even if the court went beyond its powers. That court has always had jurisdiction over the person and estates of minors, and while it must be exercised according to law, yet if the court exceeds its powers under the law, it is not a naked assumption of power, as might be the case if the tribunal had no such jurisdiction. Its action, then, being not a nullity, but, if void at all, only relatively so, strangers cannot disregard it.

1. Were defendants purchasers without notice? McCoy, one of the Old Town Company, testifies that the lots belonging to the company were divided, and the one in controversy, with fifty or sixty others, fell to him. He speaks of a deed that included them, and that this and another were marked out of his deed when, as he supposes, Chouteau deeded to Huffman. The instrument by which he drew his lots is not given, and we are not advised whether the title, at the time of Chouteau's deed, was in him, or in him and the others. He says, however, that it was his interest that was sold. In 1866 he executed a quit-claim deed for the two lots to Chas. J. Thompson, one of the defendants, for

$200, and testifies that he told Thompson that he (McCoy) might have the legal title, but had no equitable right to the property. He testified at some length, and there is apparent contradiction in his testimony, arising principally from mixing up statements of what he knew and what he supposed to be true from seeing the papers, etc. He is very clear, however, that he made no claim to the ownership of the lots, although the title seemed to be in him, or in the Town Company, as the Chouteau deed was missing. Some of the defendants were real estate agents, and had abstracts of titles which left these two lots in McCoy, which was the reason they purchased of him. It is apparent that they did not suppose that he really owned them, and they gave him but a nominal consideration, their value being $4,000, and evidently supposed that by getting a quit-claim from him and his former co-partners they could cut out the title of the real owner, whoever he might be.

Saying nothing of the publicity of the judicial proceedings showing that the property belonged to the Scott heirs, and that the plaintiffs became purchasers, and of their effect as notice, the inquiry arises whether a purchaser who buys of one who, as he supposes, has the legal title, but who informs him that, even if it be so, he does not own the property and makes no claim to it, and for a nominal consideration obtains from him a quit-claim deed, can be called an innocent purchaser, and can be protected either in equity or under the registration act. Clearly not. The purchaser lacks the elements which are essential to the protection of innocent purchasers.

Judge Wagner concurring, the judgment will be affirmed. Judge Adams, having been of counsel, not sitting.

THE STATE OF MISSOURI *ex rel.* AND TO USE OF JACKSON L. SMITH, ADMINISTRATOR *de bonis non* OF FRANCIS GEISBERG, Respondent, *v.* HENRIETTA BRUNS, EXECUTRIX OF B. BRUNS, JOHN BAUER AND G. H. DULLE, SURETIES, Appellants.

1. Judgment affirmed.

Appeal from Cole Circuit Court.

Lay & Belch and *E. L. King & Bro.*, for appellants.

White, with *Ewing & Smith*, for respondent.

ADAMS, Judge, delivered the opinion of the court.

This was a suit against the defendant Henrietta Bruns, as administratrix of Bernard Bruns, deceased, and against the other defendants as sureties of Bernard Bruns on his bond as administrator of the estate of Francis Geisberg, deceased. The answers were general denials of all the allegations of the petition.

Upon the trial the plaintiff introduced the order of the County Court showing his appointment as public administrator of Cole county, and his bond given as public administrator, and an order of the County Court directing him to take charge of the estate of Geisberg, deceased, the former administrator having died. He also read in evidence, without objection, the bond given by Bruns, deceased, as administrator of Geisberg, and the defendants as his sureties; and evidence conducing to show the breaches of this bond as charged in the petition and the amount of assets not accounted for.

The plaintiff asked two instructions which covered the case as alleged in the petition. The defendants asked fifteen instructions, which it is unnecessary to recite, as, taking them together, they amounted to a direction to the jury that, upon the evidence given, they must find for the defendants.

I have examined this record carefully, and can see no objections to any of the evidence given on the part of plaintiff. It seems to have fully made out the case as laid in the petition.

Upon the whole record, the judgment is for the right party. Let it be affirmed. The other judges concur.

W. B. HOWARD, Plaintiff in Error, *v.* B. H. THORNTON, Defendant in Error.

1. *Judgment — Jurisdiction must be shown from the whole record.* — If the whole record of a cause taken together does not show that the court had jurisdiction over the defendant, then the judgment would be a nullity. But a court has no right to draw this conclusion from the entry of the judgment.
2. *Trustee — Powers, delegation of.* — A trustee or mortgagee cannot act through an agent in the sale of the trust property, unless the deed expressly authorizes him to delegate his powers.
3. *Mortgage — Outstanding title.* — A mortgage constitutes a good outstanding title.

Error to Bates Circuit Court.

A. Comingo, for plaintiff in error.

F. P. Wright, for defendant in error.

ADAMS, Judge, delivered the opinion of the court.

This was an action of ejectment. The parties both claimed under one J. T. Thornton as the common source of title. The plaintiff stood upon a sheriff's deed. The defendant set up a subsequent deed to himself from J. T. Thornton and wife, and also set up a previous mortgage with power of sale in the mortgagees, who had made the sale under the mortgage by and through an attorney in fact appointed for that purpose. The case was submitted to the court for trial, and a verdict and judgment were rendered in favor of the defendant.

The sheriff's deed was conceded to be good upon its face. But the defendant alleged that the judgment upon which the execution was issued was a nullity because the court had no jurisdiction over the defendant in the alleged judgment; and to prove this, the simple entry of the judgment was introduced as evidence, without producing any other part of the record. The entry of the judgment showed that the defendant was called and came not, and that the court proceeded to render up a final judgment. Upon this evidence the court declared the law to be that the judgment was void, and that the sheriff's deed conveyed no title.

1. It is a well-settled principle that a judgment rendered without notice or the appearance of the party is absolutely void. But

when a judgment is attacked for want of notice, how can the court determine by the mere inspection of the entry whether the defendant had been served with a summons? If, in point of fact, the defendant was actually served with a summons, the court had jurisdiction over his person and could proceed to render a personal judgment against him. The recitals in the sheriff's deed were *prima facie* evidence of a valid judgment, and this could not be overthrown without producing the whole record or a transcript of it, or, in case any part of it was lost, by parol evidence of the lost parts. Simple extracts from the record are not admissible for this purpose. (Philipson v. Bates, 2 Mo. 95; Peake's Ev. 30–43; Ravenscroft v. Giboney, 2 Mo. 1.) If the whole record taken together does not show that the court had jurisdiction over the defendant, then the judgment would be a nullity. But the court had no right to draw this conclusion from the entry of the judgment alone.

2. A trustee in a deed of trust, or a mortgagee in a mortgage with power of sale, cannot act through an agent in the sale of the property. His own powers are delegated and are a personal trust, and unless the deed authorizes him to delegate his powers, he can not act through an agent. This was expressly decided by this court in the case of Graham v. King, *ante*, p. 22. But a mortgage after forfeiture constitutes a good outstanding title. But from the record before us, this mortgage does not cover all the lands in the sheriff's deed.

For the error in excluding the sheriff's deed under the state of facts before the court, its judgment must be reversed and the cause remanded. The other judges concur.

JOHN HINDMAN *et al.*, Plaintiffs in Error, *v.* JAMES H. PIPER *et al.*, Defendants in Error.

1. *Trusts and trustees — Appointment by Legislature — Constitution — Ministerial and judicial appointments.* — Where the original trustee in a deed of trust died, and the Circuit Court of the county was suspended by the Legislature, so that the vacancy could not be supplied by judicial decree, a trustee might, under the old constitution, be appointed by act of the Legislature to

carry out the provisions of the trust. Such act was not a retrospective law. Nor was it a legislative judgment or a means of depriving the owner of the land of his property without due process of law.

The general power of the Legislature, independent of the present constitution (art. IV, § 27), to appoint trustees to execute trusts, cannot be controverted. They are usually appointed by courts upon judicial inquiry. But where, as in the above case, the act was purely ministerial and *ex parte*, the Legislature was (prior to the date of the new constitution) vested with full power to make the appointment. But *contra*, where, in case of a person *sui juris*, the act created the trustee and gave in the first instance the power to sell, the rule is different. The enactment, in that state of facts, would clearly transcend the legislative power.

Error to Kansas City Court of Common Pleas.

J. K. Sheley, for plaintiffs in error.

Adams & Son, for plaintiffs in error.

The appointment was not the exercise of judicial power. There was nothing to adjudicate. It was not a retrospective act, and did not impair the obligations of any contract. It was simply the exercise of an administrative power or an ordinary legislative function, carrying out the purposes of all the parties to this deed of trust. (See Stewart v. Griffin, 33 Mo. 13; Gannet v. Leonard, 47 Mo. 205.) The principles of these cases are directly in point with the case at bar. (See also Cooley's Const. Lim. 97–106; Rice v. Parkman, 16 Mass. 326; Cochran v. Van Surlay, 20 Wend. 373; 15 Wend. 436; 24 How. 427; 12 Ala. 369; 16 Ohio, 251; 2 Pet. 660; 16 Pet. 25–60; 8 Blackf. 10; Thurston v. Thurston, 6 R. I. 296; Williamson v. Williamson, 3 S. & M. 715; 29 Miss. 146; 30 Miss. 246; 14 Serg. & R. 434; 2 Greenl. Ch. 20; 11 Gill & J. 87; 2 Penn. St. 277; Walker, 258; 7 Metc. 388; 14 N. Y. 423.)

Karnes & Ess and *L. C. Slavens*, for defendants in error.

BLISS, Judge, delivered the opinion of the court.

This was an action for the possession of real estate. It appeared that in 1860 one Scott Coffman, being the owner of the premises, made a deed of trust of the same to one David Hindman to secure a debt due one Adams, and afterward conveyed the same

land absolutely to said Hindman, who died intestate in 1862, leaving the plaintiffs his heirs, the secured note having in the meantime passed into the hands of the defendants. In 1863 (Sess. Acts 1863, p. 161) the Legislature suspended the sessions of the Circuit Court in Jackson county, and in December of that year (Sess. Acts 1863–4, p. 585) an act was passed for the relief of James H. Piper and George C. Bingham, which recited the execution of the deed of trust and the transfer of the note secured by it, the death of the trustee, the fact that the general law authorizing Circuit Courts to fill vacancies which might take place, by death or otherwise, in the office of trustee was of no effect in the county of Jackson by reason of the special act first above referred to, and enacted that the sheriff of Jackson county be created a trustee in the place of said David Hindman, deceased, to execute and carry into effect the provisions of said deed of trust, in form, manner, and every respect, as if appointed by the Circuit Court in pursuance of existing law. Coffman still failing to satisfy the note upon demand of its owners, John H. Hayden, then the sheriff of Jackson county, proceeded to sell the land under the trust deed, which was bid in by the holders of the note, the present defendants, and he executed a deed in regular form.

Upon the trial the court, at plaintiff's instance, made a declaration of law that the last mentioned act of the general assembly was unconstitutional and void, because, 1st, it was retrospective; 2d, the act was judicial; and, 3d, it deprived the plaintiff of property without due process of law.

Defendants asked a counter-declaration, also others not necessary to be considered, which were refused, and judgment was given for the plaintiff.

1. The constitution forbids retrospective laws, and if this act is subject to that objection it was void. Retrospective acts are usually passed to legalize some past proceeding or act which would not be legal without them, as a defective conveyance or judicial proceeding. How the appointment of an officer to do what the party has already authorized some one to do, can be called retrospective I am unable to see.

2. Neither was the act judicial. The old constitution, as well

as the present, separated the judicial from the legislative function, and the legislative judgment would be unconstitutional. (The State *ex rel.* Pittman v. Adams, 44 Mo. 570.) But the appointment, merely, of a trustee, the trust being already created, is not a judicial act. The trust was created by the party under whom the plaintiff claims. The appointment of the trustee does not operate as a judgment to bar any of the plaintiff's rights. If he would attack the trust, if he would claim to hold the estate divested of it, or if he would attack the sale by showing that the trustee was still alive, the appointment in no way hinders him. His rights are not attempted to be passed upon, and all he possessed before he still retained. The Circuit Court had authority when the trust deed was executed, in the contingency which happened, to direct the sheriff to act as trustee. This was merely an *ex parte* ministerial act, void if there was no trust in fact, or if it had been extinguished, or the contingency had not happened. The powers which the sheriff could exercise were derived from the deed, and not from any judgment of the court. The session of the court being suspended, the sovereign power of the State — the power which itself had authorized the court to direct the sheriff to act — itself gives the direction, leaving the rights of the parties as undisturbed as if it had been made by the court under the statute.

Nor is the plaintiff deprived of property without due process of law, unless all rules under trust deeds thus deprive their grantors. All the authority of the new trustee is derived from the original deed under the law as it then existed, and he has no greater than had the original trustee. The deed was a voluntary conveyance of all the rights that can be acquired under it, and any rights reserved are just as effectually reserved after as before the new designation. Such designation only furnished a remedy for a wrong; it did not invade a right.

The general power of the Legislature to appoint trustees to execute trusts cannot be controverted. They are usually appointed by courts, and upon judicial inquiry the chancellor will always supply them rather than that the trust shall lapse. Sometimes, as in the present case, the act is purely ministerial and *ex parte*,

and as the authority is derived from the law, the law-making power can do directly, unless forbidden by the fundamental law, what it can authorize a subordinate jurisdiction to do.

The most common instances of the appointment of trustees by the Legislature are when a trustee is created by special enactment, as the appointment of trustees with power to sell the property of persons *non sui juris*, as infants, insane persons, etc. This power, except when expressly prohibited by the local constitution, as now in Missouri, has seldom been denied. (See Rice v. Parkman, 16 Mass. 326; Cochran v. Van Surlay, 20 Wend. 373; Carroll v. Almsted, 16 Ohio, 251; Cooley's Const. Lim. 97, 106, and cases cited.) It has been recognized by this court in Stewart v. Griffith, 33 Mo. 13; The State, etc., v. Boon, 44 Mo. 254, and Gannet v. Leonard, 47 Mo. 205. The power would not be sustained in the disposition of the property of a person *sui juris;* and if the act under consideration created the trust and gave in the first instance the authority to sell, it would clearly be transcending legislative powers.

I find no provision of the constitution then in force that was violated by the act designating the trustee, and his action is admitted to be regular. The loss of the property was by the deed of the party then owning it, and no injustice or hardship is complained of. Without, then, considering the defendants' objections to the plaintiff's right to sue, the action of the court below was radically wrong, and its judgment will be reversed and the petition dismissed. Judge Wagner concurs. Judge Adams, having been of counsel, not sitting.

HENRY J. WELTON *et al.*, Appellants, *v.* JACOB HULL, REPRESENTATIVE OF JESSE WELTON, DECEASED, LATE ADMINISTRATOR OF LEWIS WELTON, Respondent.

1. *Administration — Final settlement — Sale of land — Mortgage — Construction of statute — Subrogation.* — Where an administrator, under section 10, article II, of the administration act, sold the title of decedent as owner in fee simple of certain lands, and divided the proceeds in payment of the debts of his estate, the administrator cannot, in his final settlement, be compelled to

debit himself with that portion of the proceeds paid to a creditor whose claim had already been secured by deed of trust on the land sold.

In such case the creditor is not compelled to look to his deed of trust alone, but may satisfy his debt out of the general assets in the hands of the administrator.

ON MOTION FOR REHEARING.

The payment of the debt out of the general fund, by the administrator, did not extinguish the encumbrance upon the land. But on payment so made, the estate of the deceased became entitled to the amount thus paid, and the same may be recovered out of the lands in the hands of the purchaser at the administrator's sale, by an administrator *de bonis non*, for the benefit of the estate.

Appeal from Osage Circuit Court.

Lay & Belch, for appellants.

To pay debts the court shall order all the right, title and interest of the estate, etc., to be sold at public sale. (Wagn. Stat. 94, § 8.) This the court did. The sale was that of the equity of redemption, and its proceeds would not be applied to the purchase of the legal title.

Ewing & Smith, with *P. B. McCord*, for respondent.

The administrator sold the whole estate, legal and equitable. There were no assets belonging to said estate with which to redeem. (Wagn. Stat. 94, §§ 8–9.)

BLISS, Judge, delivered the opinion of the court.

Jesse Welton, deceased, was administrator of the estate of Lewis Welton, deceased. One Townley held a claim against the estate for over $5,000, which was presented and allowed and assigned to the fifth class. This demand had been secured by a deed of trust upon real estate of decedent, but that fact was not shown when it was presented. Afterwards the administrator obtained an order for the sale of the real estate for the payment of debts. This debt, among others, was named in the petition. No allusion was made to the deed of trust. The land was appraised and sold precisely as though no such deed existed. It seems to have brought a full price, being six-sevenths of the appraised value, and the proceeds were applied to the payment of

the debts, including the one so secured upon the land. All the debts were paid, and on final settlement by Jacob Hull, on behalf of the administrator, who had died, the heirs of Lewis Welton appeared and objected to the credit of $6,044.17, being the amount paid upon said secured debt, and claimed that only the interest of the estate in the land was sold, subject to this debt; that the creditor should look to the land, and not the estate; and that the administrator had no right to pay the claim out of the general assets.

The administrator did not attempt to follow the provisions of sections 6 and 8, chapter 122, Gen. Stat. 1865 (Wagn. Stat. 94), but sold the land as required by section 10. The application was not to sell the interest of the estate subject to the trust deed, but the land itself, or rather the interest of decedent as owner in fee, and there were no special orders of the court in regard to its redemption or sale subject to the debt.

It is unnecessary to indicate the whole duty of the administrator in the premises, but it is clear that he acted in good faith; that it was his duty to pay all claims properly presented and allowed; that the purchase-money of the land was applied to their payment; and now, to make his representatives pay to the heirs of his intestate the amount of this large debt so paid off by him would be grossly unjust.

The creditor pursued the estate generally, as he had a right to do. There is no special statutory provision applicable to this state of facts. Had the debt been paid previous to the sale, the whole would have passed; and we need not now say whether its payment, after an apparent sale of the whole estate, would discharge the lien. At the time of the sale the lien existed, and it may still exist, in favor of the creditors; but I do not feel at liberty, without further investigation, to say more upon this point. It is sufficient that the administrator could not compel the creditor to look alone to the land, and that he had a right to pay his claim. It is for paying this debt that it is now sought to charge him, and not for neglect of duty in any other particular; and I think the judgment of the Circuit Court, which affirmed the action of the Probate Court, should be affirmed. The other judges concur.

Lay & Belch, on motion for a rehearing.

I. The decision is in conflict with an express statute. The statute provides that where lands of deceased are encumbered by deed of trust, etc., "if such redemption would injure the estate or creditors, or there would not be assets to redeem such estate after payment of debts, the court shall order all the right, title and interest of the estate to such property to be sold at public sale." (Wagn. Stat. 94, § 8.)

No other interest can be sold, yet the court decides that the administrator sold the legal as well as the equitable title.

II. This decision is in conflict with the decision in the cases of Delassus v. Poston, 19 Mo., on pages 430–32; also the case of McNair *et al.* v. O'Fallon, 3 Mo. 188, opinion on page 202; and the case of Lumly v. Robinson, 26 Mo. 364, which are cited by plaintiff.

III. The court clearly misapprehended the facts, and the opinion is based upon the fact that the sale was not made under sections 6 and 8 of article III, Wagn. Stat. 94, when the record shows that the administrator, by order of the court, was directed to sell only the right, title and interest of the deceased in and to the land. The question is, does the money arising from the sale of an equitable legal title go to the estate of the deceased, or to the person holding the legal title? This question the court does not decide.

ADAMS, Judge, delivered the opinion of the court on motion for rehearing.

Lewis Welton, being indebted to one Townley for over $5,000, executed a deed of trust on his real estate to secure this debt. He afterwards died intestate, and his estate was administered on by Jesse Welton. This debt of Townley's was allowed against the estate and placed in the fifth class of demands.

Afterwards, as there was not sufficient personal property to pay the debts, Jesse Welton, as administrator, procured an order of the Probate Court to sell the real estate for payment of debts, and under this order did sell the real estate and realized enough to pay all the debts of the estate; and the debt secured by the

deed of trust, together with the other debts, were paid off by him out of the proceeds of the sale.

Jesse Welton, the administrator, died before making final settlement, and Jacob Hull, as his administrator, made application for settlement, and among other credits claimed credit for $6,044.17, amount paid in discharge of the debt secured by the deed of trust. To this credit the plaintiffs, as distributees, objected, asserting that Jesse Welton, as administrator, had no right to pay this debt out of the proceeds of the sale of the real estate.

The case was taken to the Circuit Court by appeal, and that court allowed the credit as claimed.

1. I am unable to see the force of the objection urged by the distributees to this credit. The real estate was sold subject to the deed of trust, and the proceeds of sale became assets in the hands of the administrator for payment of the debts according to their classification. This debt was in the fifth class of demands, and the administrator not only had the right, but it was his duty, to pay this debt ratably with the other debts in the fifth class. As Townley's debt was secured by deed of trust, he had two remedies for its collection. He might either proceed against the real estate by foreclosure and sale under his deed of trust, or he might proceed against Welton *in personam* if alive; or, which is the same thing, have the demand allowed against his estate if dead, and collect it out of any of the assets applicable to the payment of debts of its class.

The allowance and classification of this demand did not in any manner affect the security he held on the real estate for its payment. Nor did the administrator's sale for payment of debts destroy this security. It still remained on the lands notwithstanding the sale, and the purchaser at such sale took the lands subject to this encumbrance.

2. The payment of this debt did not extinguish the encumbrance upon the lands, but upon the payment of the debt the estate of Lewis Welton became entitled to the amount so paid, to be made out of the lands in the hands of the purchaser at the administrator's sale. It is not exactly a subrogation of the estate

to the rights of the creditor, but is in the nature of a subrogation, or rather a return to the estate of a security which had been pledged for the payment of a debt.

Where a debt is paid by the debtor, all securities given or pledged for the payment must be returned to the proper owner. So in this case, as the debt for which the deed of trust was given has been paid out of the assets of the estate, the amount may be recovered out of the lands by an administrator *de bonis non* for the benefit of the estate.

The motion for rehearing is overruled. The other judges concur in this conclusion.

J. BROWN HOVEY, Defendant in Error, *v.* ANTHONY SAUER, GARNISHEE OF HENRY SPEAR, Plaintiff in Error.

1. *Practice, civil — Garnishment — New trial — Bill of exceptions.* — In case of a judgment against a garnishee, where no motion for new trial is made and no bill of exceptions appears, except one filed to the refusal of the court to set aside a default against the garnishee and permit him to answer, judgment will be affirmed.

Error to Jackson Circuit Court.

W. E. Sheffield, for plaintiff in error.

J. Brown Hovey, for defendant in error.

ADAMS, Judge, delivered the opinion of the court.

The plaintiff recovered a judgment against Henry Spears, and garnished the defendant, Anthony Sauer, on execution issued on said judgment. At the return of the garnishment the plaintiff filed allegations and interrogatories against the garnishee, but the clerk failed to note the filing on the minutes. The garnishee made default, and a judgment by default was rendered against him, which was made final at the first term. At the next term, on motion of the garnishee, the final judgment was set aside; but the garnishee showing no cause for setting aside the default, the court refused to set it aside and permit the garnishee to answer, and again heard proof as to the garnishee's indebtedness, and

rendered final judgment. A bill of exceptions was filed to the refusal of the court to permit the garnishee to answer. But no motion was made for a new trial, and no other bill of exceptions. There is nothing in the record to warrant a reversal of the judgment.

Judgment affirmed. The other judges concur.

MARY DEVITT, Respondent, *v.* PACIFIC RAILROAD, Appellant.

1. *Practice, civil — Additional instruction.* — If the law has already been correctly laid down in an abstract form for one party to a cause, but the other, in order to prevent misconception, asks to have it applied to the facts as he claims them to be, by an additional appropriate instruction, it should be granted.
2. *Action for damages by employee — Negligence of employer — Contributory negligence.* — If the principal has been guilty of fault or negligence, either in providing suitable machinery, or in the selection or employment of agents or servants, and injuries arise in consequence, he must respond in damages. But when the servant himself, well knowing the default of his principal, as in providing defective or unsuitable machinery, voluntarily enters upon the employment, he assumes the risk and cannot hold his employer for the consequences.

Appeal from Kansas City Court of Common Pleas.

J. N. Litton, for appellant.

If Devitt knew of the exposure to danger in having to pass under the bridge, and with such knowledge consented to and did continue in this service, he could not recover. (Hayden v. Smithville Manuf. Co., 29 Conn. 548; Owens v. N. Y. Central R.R., 1 Lansing, N. Y., 108; Wright v. N. Y. Central R.R. Co., 25 N. Y. 566; Dynen v. Leach, 26 Law Jour., N. S. Exch., 221; Alsop v. Yates, 27 Law Jour., N. S. Exch., 156; Buzzell v. Laconia Manuf. Co., 48 Me. 114; McGlynn v. Brodie, 31 Cal. 376; Davis v. Detroit & Milwaukee R.R., 20 Mich. 105; Thayer v. St. Louis, Alton & Terre Haute R.R., 22 Ind. 26; Ind. & Cinn. R.R. v. Love, 10 Ind. 554; Frazier v. Pennsylvania R.R., 38 Penn. St. 104; Griffiths v. Gidlow, 3 Hur. & Nor. 648 Exch.; Skipp v. Eastern Railway Co., 9 Exch. 223; Wonder v. Balt. &

O. R.R., 32 Md. 411–420; Moss v. Johnson, 22 Ill. 633; Farwell v. Boston & Worcester R.R., 4 Metc. 57; Coon v. Utica & Erie R.R., 6 Barb., N. Y., 241; 3 Robt., N. Y., 74; Ogden v. Rummens, 3 Foster & F. 751; Smith v. Dowell, *id.* 238; Priestly v. Fowler, 3 Mees. & W. 1; Coombs v. New Bedford Cordage Co., 102 Mass. 572; Greenleaf v. R.R., 29 Iowa, 14; Schouler Dom. Rel. 620; Shearman & R. Negl. 118, § 94; Pierce Am. Railw. 297.)

W. E. Sheffield, for respondent.

I. As to the question of the negligence of the appellant and also of James Devitt, the instructions given by the court present the matter quite as strongly in favor of the appellant as the law will warrant.

II. No laches or neglect is imputable to an infant during his minority, because he is not supposed to be cognizable of his rights or capable of enforcing them.

Bliss, Judge, delivered the opinion of the court.

The plaintiff recovered damages below, under the third section of the damage act, for the death of her minor son while in defendant's employ. The facts are undisputed. The plaintiff's son was a brakeman on a freight train, and was killed while at his brake upon the top of a freight car, in passing through Post Oak bridge, the cross timbers on the top of the bridge being so low as to strike his head. The accident occurred in the day time, and it was shown that deceased had been in defendant's employ about three weeks; that he had passed this bridge every day during that time; that he had repeatedly been warned to look out for this and other bridges; that when last seen, just before reaching the bridge, he was sitting upon his brake, facing it. The following instructions, asked by defendant and refused, raise the only legal questions necessary to be considered:

"If the jury believe from the evidence that the deceased, James Devitt, while in the employment of his duty as brakeman, passed over the bridge in question (Post Oak bridge) daily for the space

of two or three weeks, and that he knew the danger of coming in contact with the top of said bridge, and that his attention had been called to the danger of injury from the lowness of the bridges on his route, and that with this knowledge he sat upon the top of the brake on the freight car, and while so sitting there was in passing struck by the top thereof and killed, then the jury are instructed that this was contributory negligence on the part of deceased, and that plaintiff cannot recover."

"If the deceased knew of the exposure to danger in serving as brakeman for defendant upon a train having to pass bridges insufficiently high to permit him to pass under them, while standing at full height on the top of a car, and with such knowledge consented to and did continue in the service of the defendant as such brakeman, and was thereafter killed by coming in contact with the top of one of said bridges, then the plaintiff cannot recover from the defendant from any negligence in the construction of the bridge."

Both these instructions should have been given. Upon the facts supposed in one, the deceased was killed in consequence of his own negligence, which not only contributed to, but was the immediate cause of, his death; and upon the hypothesis embraced in the other, the deceased voluntarily encountered the danger, took upon himself the risk of the low bridge, well knowing its height; and even though it was wrongfully built at that height, and would charge the defendant under other circumstances, the plaintiff cannot recover.

1. Upon the facts first supposed, it would almost seem that the deceased committed suicide; at least that he was trying the extremely hazardous experiment of sitting upon the brake, which was a high one, and which elevated him higher than he would have been upon his feet, to see whether he could stoop sufficiently to clear the timber. It would be difficult to imagine a clearer case of contributory negligence, and if one guilty of it could recover, or his friends for him, if the experiment proved fatal, we must necessarily ignore the legal consequences of such negligence. Upon this point counsel claim that the jury had already been properly instructed, and that the instruction refused was superfluous. It

is true that the jury had been told that if they believed that said Devitt was killed by reason of the negligence of defendant in building the bridge, "without negligence on his part contributing thereto," they should find for plaintiff. This proviso in regard to contributory negligence was general in its terms, and might not be understood by the jury. We all know that jurors, where, as in Missouri, verbal explanation by the court is forbidden, are liable to be deceived as to the law, even when correctly stated. Instructions are apt to assume too much of an abstract character; and if the other party, in order to prevent misconception, ask to have the law applied to the facts, as he claims them to be, by an additional appropriate instruction, it should be given. The jury might not know what was contributory negligence, and therefore the defendant had a right to have the matter explained, and to require that they be told that certain facts which the evidence tended to establish constituted such negligence.

2. Upon the other point the law is settled. An employee or servant cannot recover for injuries received from the negligence of other servants when the principal is not at fault. But if the principal has been guilty of fault or negligence, either in providing suitable machinery, or in the selection or employment of agents or servants, and injury arise in consequence, he must respond in damages. This liability is, however, modified when the servant himself, well knowing the default of his principal, as in providing defective or unsuitable machinery, voluntarily enters upon the employment. By so doing he assumes the risk, and hence cannot charge it to his employer. (Wright v. N. Y. C. R.R., 25 N. Y. 566; Buzzell v. Laconia M. Co., 43 Me. 113; Thayer v. St. L. & T. H. R.R., 22 Ind. 26; Hayden v. Smithville M. Co., 29 Conn. 548; Mad River & L. E. R.R. v. Barber, 5 Ohio St. 541.) Much of the work of the country is done without the employment of the best machinery or the most competent men, and it would be disastrous if those prosecuting it were held to insure the safety of all who enter their service. If persons are induced to engage, in ignorance of such neglect, and are injured in consequence, they should be entitled to compensation; but if advised of it, they assume its risk. They contract with

reference to things as they are known to be, and no contract is violated and no wrong is done if they suffer from a neglect whose risk they assumed. *Volenti non fit injuria.*

The other judges concurring, the judgment will be reversed and the cause remanded.

MARTIN W. MANN, Defendant in Error, *v.* JOHN G. SCHROER, Plaintiff in Error.

1. *Mechanics' lien — Petition — Amendment — Ninety day limitation.* — An amended petition correcting the original description in a suit on a mechanic's lien is merely a continuance of the original action, and where that was brought within ninety days after filing the lien, plaintiff is not barred by the lien limitation law.
2. *Judgment* nunc pro tunc — *Motion for — Notice of, etc.* — Where a clerk, in entering up judgment on a mechanic's lien, omitted to make a special judgment, the entry of a special judgment correcting the mistake *nunc pro tunc*, without notice to defendant, is not such an error as would render the judgment void or could be taken advantage of in a collateral proceeding. But where the case is directly brought up by writ of error, the failure of plaintiff to notify defendant of his motion to correct the judgment will render it proper to reverse and remand the cause, with leave to plaintiff to renew his motion.

Error to Henry Circuit Court.

J. La Due, for plaintiff in error.

I. The original petition, so far as enforcing said pretended lien was concerned, was totally defective, and no special judgment could have been rendered thereon. That being the case, the law does not allow the filing of an amended petition constituting an entirely new cause of action, after it is too late to bring said action in an original suit.

II. The general judgment rendered in this cause in the Circuit Court operated to destroy, and release the property from, the lien (if any there was at that time), and that general judgment never having been disturbed, vacated or set aside, no lien on the property has ever attached the second time by virtue of the subsequent proceedings of the court below pretending to correct the original judgment.

III. There certainly was no lien on the real estate described in the amended petition during the six months intervening from the rendition of the general judgment to the time of the pretended special judgment; and in the meantime the property changed hands. Can it be contended that a new lien could be created by the court six months thereafter?

IV. In this case it was impossible to except or object to the proceedings in the court in the attempt to reform or correct the original judgment, as no notice was given to the defendant in the court below or his attorney, and he knew nothing of the proceedings until after the judgment of the court.

F. P. Wright, for defendant in error, relied upon Gibson v. Chouteau's Heirs, 45 Mo. 171.

ADAMS, Judge, delivered the opinion of the court.

This was an action brought on a mechanic's lien. In his original petition the plaintiff misdescribed the property on which he filed the lien. At a subsequent term, and more than ninety days after the lien was filed, he filed an amended petition correcting the description. The defendant filed answer, and among other things set up that the suit was not commenced within ninety days after the lien was filed.

The original petition was filed and the writ of summons was issued within the ninety days, and the amended petition was only a continuance of the original proceeding, and not the commencement of a new action. The court tried the case at the October term, 1870, and gave judgment for the plaintiff. No motion was made to set aside the judgment, or for a new trial, nor was any bill of exceptions saved.

The clerk, however, in entering up the judgment, omitted to make it a special judgment on the lien sued on, and it stood thus until the next term of the court, when the plaintiff filed a motion to have an entry *nunc pro tunc* of the proper judgment, correcting the clerical mistake in the original judgment; and such judgment was accordingly entered as of the last term. It does not appear from the record that the defendant had any notice of

this motion or of the action of the court upon it. After the end of a term at which a final judgment is rendered, the defendant is no longer in court for any purpose connected with such judgment. But the entry of this *nunc pro tunc* judgment, without notice to the defendant, is not such an error as would render the judgment void, or as could be taken advantage of in a collateral proceeding. The case, however, has been brought before us by writ of error, and we are called upon to act directly upon the record. While it is perfectly competent at a subsequent term to make such entries in furtherance of justice, we think the defendant ought to be notified to show cause why such entry should not be made. He may be able to show that the judgment has been satisfied, and therefore that such entry might be unnecessary. But unless good cause is shown, the court undoubtedly ought to make the entry.

As the defendant was not notified and did not appear, this *nunc pro tunc* judgment is reversed and the cause remanded, with leave to the plaintiff to renew his motion for a *nunc pro tunc* judgment. The other judges concur.

RICHARD WOODSON *et al.*, Defendants in Error, *v.* J. G. SCHROER, Plaintiff in Error.

1. Mann v. Schroer, *ante*, p. 306, affirmed.

Error to Henry Circuit Court.

F. P. Wright, for defendants in error.

J. LaDue, for plaintiff in error.

ADAMS, Judge, delivered the opinion or tne court.

The record in this case is precisely the same as that in the case of Mann v. Schroer, *ante*, p. 314, and the judgment must be the same and the rulings the same.

The *nunc pro tunc* judgment in the case is reversed and the cause remanded, with leave to the plaintiff to renew his motion for a *nunc pro tunc* judgment. The other judges concur.

The State of Missouri, Respondent, *v.* Thomas Wyatt, Appellant.

1. *Practice, criminal — Juror — Expression of opinion as to guilt or innocence of accused — Verdict set aside, when.* — Where, at the impaneling of the jury in a criminal cause, none of them disclosed the fact that they had expressed an opinion as to the guilt or innocence of the accused, but it was afterwards proved that one of them had previously declared his belief that the defendant was guilty, and had stated that he ought to be punished, the verdict should be set aside.
2. *Practice, criminal — Jury — Instructions as to grade of crime.* — Before a jury can convict of a certain degree of crime, they should be instructed as to what it takes to constitute the elements of that degree.

Appeal from St. Clair Circuit Court.

E. J. Smith and *Waldo P. Johnson*, for appellant.

A. J. Baker, Attorney-General, for respondent.

Wagner, Judge, delivered the opinion of the court.

It appears from the record that one Fisher was indicted for the killing of a man by the name of Murphy, and the defendant was charged with being present, aiding, helping, abetting and assisting him in the commission of the crime. Upon the trial the jury found the defendant guilty of manslaughter in the second degree, and assessed his punishment at three years' imprisonment in the penitentiary. From the judgment and sentence rendered on this verdict he has appealed.

The principal reasons assigned for error are that one of the jurors who tried the case was incompetent to sit, and also that erroneous instructions were given on the part of the State. When the jurors were impaneled none of them disclosed the fact that they had formed or expressed an opinion in reference to the guilt or innocence of the accused. But after the trial a motion was made to set aside the verdict on the ground that Whitaker, who was foreman of the jury, had previously declared his belief as to the defendant's guilt, and had stated that he ought to be punished. This motion was sustained by affidavits. Whitaker filed a counter-statement in which he did not deny using the

expressions imputed to him, but said he was laboring under a misapprehension, and that he was thinking of a different case. This affidavit of Whitaker is not satisfactory, and is opposed by evidence which is much more explicit and clear. One of the affiants states positively that in the week previous to the trial Whitaker expressed his fears that defendant would be acquitted, and stated that it ought not to be so, as he believed he was guilty. The other one says that he was guarding the prisoner when he was confined in jail, and Whitaker accosted him and made inquiries respecting the defendant, and manifested his sentiments as to his guilt. The two witnesses who filed these affidavits appear to be truthful and unbiased, and no attempt is made to impeach their credibility in the least. The impression on my mind, from reading all the statements together, is that the juror was disqualified, and that it would be an imputation on the administration of criminal justice to permit the verdict to stand. (State v. Burnside, 37 Mo. 343.)

All the instructions asked for by the defendant were given, and they were sufficiently favorable. The instructions given for the State are not materially objectionable so far as they go, but they fail entirely to inform the jury about points which it was most important for them to know. The court nowhere tells the jury what it takes to constitute any of the grades of homicide, and yet instructs them that the punishment for murder in the first degree is death; for murder in the second degree, imprisonment in the penitentiary not less than ten years; that persons convicted of manslaughter in the first degree shall be imprisoned for a term not less than five years, and if of manslaughter in the second degree, for not less than three nor more than five years. The instruction then goes on defining the punishment for the lesser degrees. This instruction is almost identical with the one which was condemned by this court in Sloan's case (47 Mo. 604).

Before the jury can convict of a certain degree they should be informed and instructed as to what it takes to constitute the elements of that degree. Any other practice would lead to uncertainty and would render the jury liable to be misled, and to assess

punishments for a degree other than the evidence showed the defendant was guilty of.

The judgment should be reversed and the cause remanded for a new trial. The other judges concur.

BENJAMIN F. HENDRIX, ADMINISTRATOR *de bonis non* OF THE ESTATE OF LITTLEBURY HENDRIX, Respondent, *v.* FOSTER P. WRIGHT AND GEORGE R. SMITH, Appellants.

1. *Execution sale — Notice of publication — General judgment — Action for money paid — Ignorantia legis.* —An execution under a general judgment which was based on an order of publication alone is void. But where, with full knowledge of the facts and under a misapprehension only as to the law, one procures the issuance of the execution, purchases the property at sale under the execution, and pays the money to the attorney of the execution creditor, the latter is entitled to recover it from his attorney.

Appeal from Pettis Circuit Court.

F. P. Wright, for appellants.

The judgment, so far as it is rendered *in personam*, is clearly void for want of jurisdiction, and can be regarded as a nullity in a collateral proceeding. (Enos v. Smith, 7 Sm. & M. 85; 8 Sm. & M. 505.)

Smith's knowledge of the judgment and its invalidity was confined to the execution, which was a general one, reciting a judgment rendered by a court of general jurisdiction, and Smith had the right to suppose the judgment was valid.

Money paid on a void judgment may be recovered back (Newdigate v. Davy, 1 Lord Raym. 742), and if the money had been paid over to the administrator, Smith could recover it back. But Smith is not seeking to recover back the money finally paid over. He is trying to keep it from being paid over while *in transitu*. Smith notified Wright not to pay it over to the administrator, and if he had done so he would have been liable to Smith. (Wallace v. Clingen, 9 Barr, Penn., 49; Langley v. Warner, 1 Sandf. 209; Edwards v. Hodding, 5 Taunt. 815.) The money being

claimed by Smith, to whom, in equity at least, it clearly belonged, Wright, by paying it over after notice, would have rendered himself liable, even if he had been acting as attorney or agent for plaintiff. After notice he held the money as mere stakeholder, and was bound to see it applied to the proper party. (Burrough v. Skinner, 5 Burr. 2639; Sto. Agency, §§ 300, 301; Garland v. Salem Bank, 9 Mass. 408–14.)

Hicks & Phillips, for respondent.

I. The relation of clerk and attorney, of principal and agent, subsisted between respondent and Wright; and Wright having received the money as such agent and attorney, cannot set up title thereto in another, or even call upon a party claiming the money to interplead for the same, and Wright's answer should have been stricken out. (2 Sto. Eq., § 816–17, 163–4; Crawshay v. Thornton, 7 Simon's Ch. 391; Marvin v. Ellwood, 11 Paige's Ch. 365, 370, 375.) Neither could Smith, by notifying Wright not to pay over the money to respondent, convert Wright into an implied trustee for his benefit. (Bank of U. S. v. Bank of Washington, 6 Pet. 819.)

II. The judgment and execution in Benton Circuit Court were not void. (Massey v. Scott, 49 Mo. 278.)

III. The possession of Wright, the agent and attorney, of the money in controversy, is in law deemed the possession of respondent. (Dixon v. Hamond, 2 B. & Ald. 312–13.) Atkinson v. Manks *et al.*, 1 Cow. 691; Marvin v. Ellwood, 11 Paige, 376; 2 Sto. Eq. ch. 22, §§ 816–17.)

IV. The proceedings had in the Benton Circuit Court to quash the execution and set aside the sale, were nullities. The court had not jurisdiction over either plaintiff or defendant in the execution. They had no notice of such proceeding. Smith was neither party nor privy to the record.

V. Smith's demand is in the nature of one for money had and received, and although he averred in his plea that he bought under the impression that the judgment was one *in personam*, yet that fact was specifically controverted in the replication, and Smith offered not a word of proof in this distinct issue of fact;

so it remains that Smith's mistake was one of law, and he can not recover for money so paid. The doctrine of *caveat emptor* applies with peculiar force in this case. (Boas v. Updegrove, 5 Barr, Penn., 516–19; Espy v. Allison, 9 Watts, 462; Mowatt v. Wright, 1 Wend. 355; Maguire v. Monks, 28 Mo. 196–7.)

WAGNER, Judge, delivered the opinion of the court.

From the pleadings the facts in this case are briefly these: The administrator of Littlebury Hendrix, deceased, placed in the hands of the defendant Wright, an attorney at law, two notes for collection against one Atkinson. The notes were given for the purchase of real estate in Benton county, and Atkinson was a non-resident. Wright commenced a proceeding in the Benton County Circuit Court specifically against the land to obtain a vendor's lien, and Atkinson was notified by publication. Upon proof of publication being made, judgment was taken specially, giving a lien on the real estate, and a general personal judgment was also given. A special execution was issued to the sheriff of Benton county, and the land was sold and bid in by Wright for the benefit of the estate, but not for a sufficient price to satisfy the execution. Afterwards, by the direction of Wright, a general execution was issued to the sheriff of Pettis county, and certain real estate lying in that county, and belonging to Atkinson, was sold by the sheriff and purchased by Smith for an amount which satisfied the balance of the execution. This money was paid over to Wright as attorney for plaintiff, but he did not deliver it to plaintiff; and subsequently Smith notified him not to pay the same, on the ground that the sale was void and that he claimed a return of the money. In pursuance of this notification, Wright kept the possession of the money, and this suit was instituted for its recovery.

Wright, in his answer, sets out in detail the facts, the substance of which is above stated, and alleges that he was mistaken in the law as to the validity of the general judgment, and further says that at a subsequent term of the Benton Circuit Court the execution issued to Pettis county was quashed and the sale to Smith

set aside. He asks the court to determine who is entitled to the money, but says that, if it is due to the plaintiff, a reasonable fee to him for carrying on and prosecuting the suit of Hendrix against Atkinson should be deducted from the amount.

Smith was admitted on his own motion as a defendant, and in his answer set out the facts connected with obtaining the judgment in the Benton County Circuit Court; stated that the personal judgment and the execution thereunder were void; that the sale at which he bid had no validity, and that the execution was subsequently quashed and the sale set aside, and that he was entitled to the money. He further stated that at the time he bid for the property sold under execution, he believed that the judgment was valid and the sale legal. To these answers the plaintiff filed replications stating that the execution was quashed without any notice, and denying that the order of the court for that purpose had any validity. There is a denial of all the essential allegations in the answers. In reply to Smith's answer it is specially averred that Smith well knew the manner in which the judgment had been obtained and rendered; that he knew before he made the purchase that the judgment was obtained upon an order of publication, without personal service, and that Atkinson was a non-resident of the State, and that he made no personal appearance to the action. The replication further denied that Smith supposed or believed that there was any personal judgment against Atkinson other than what was rendered upon the order of publication, and also charged the fact to be that before the purchase of the property Smith was informed by his co-defendant Wright that there had been no personal appearance by Atkinson to the action, and that the judgment had been rendered upon proof of publication only, and that a purchase of real estate under an execution issued on said judgment would be valid and vest a good title in the purchaser; that defendant Wright had procured said execution to be issued to the sheriff of Pettis county at the special instance and request of his co-defendant Smith, in order that the sheriff should levy the same on the lots of Atkinson, to enable Smith to purchase Atkinson's interest in the lots, and that the same was accordingly done; that Smith

was fully informed and cognizant of all the facts connected with the rendering of the judgment, the issuance of the execution, the levy and sale.

The case was submitted to the court upon the pleadings. No evidence was introduced except the transcript of the judgment from Benton county. The court rendered judgment for the plaintiff, but allowed Wright a fee of fifty dollars for services as attorney. From this judgment both parties have brought the case here. According to the pleadings the plaintiff's case stands admitted on the record, and it appears that Smith was advised, and had full knowledge of all the facts relating to the rendition of the judgment, and that he procured the writ to be issued for the purpose of purchasing and obtaining the title to the lots which he bought at the sheriff's sale. He was a purchaser with notice, and he parted with his money voluntarily. He was not mistaken as to a matter of fact, but on a question of law, and I know of no principle on which he can be relieved. I do not think the Circuit Court of Benton county had any jurisdiction when it quashed the execution, for the proper parties were not before it. But it is not a matter of much importance here, as the execution was unquestionably void. But as Smith procured its issuance knowing all the facts, purchased the property at the sale and paid the money to plaintiff's attorney, the plaintiff is entitled to recover it from his attorney. Whether Smith had any right to come in, in this cause, and join the attorney in making a defense against his client, is a question upon which I have grave doubts. The relation of attorney and client is one of confidence and trust, and it is the duty of an attorney when he collects money to promptly pay it over to his client. It is contrary to sound morals and professional fidelity to permit an attorney to withhold money that he has collected for his client, and then join in with another person in resisting its payment over. Cases may arise in which the attorney cannot pay the money to his client with safety, but in such an event all that he has a right to do is to ask for an indemnity. Where a person claims the money in his hands and commences a proceeding against the client to establish his right, the attorney should remain passive. In this case the attorney obviously acted from good motives, and

his retention of the money, although an error, I do not think is a sufficient cause for depriving him of all remuneration for his services.

The judgment will therefore be affirmed. Judge Bliss concurs. Judge Adams not sitting.

JOEL F. KENNEY, Plaintiff in Error, *v.* JOHN JAMES, Defendant in Error.

1. *Action — Breach of warranty — Cause of action.*— In an action for breach of warranty, where the petition sets out a representation by defendant on which plaintiff relied, and which induced him to make the purchase, it states a good cause of action.

Error to Kansas City Court of Common Pleas.

W. E. Sheffield, for plaintiff in error, relied upon Carter v. Black, 46 Mo. 384.

F. M. Black, for defendant in error.

A warranty is an express contract between parties. (1 Pars. Cont. 577; 2 Kent's Com. 658.) The petition should allege an agreement, contract or warranty. (2 Chit. Pl. 278–9; Washb. Pl. and Pr. 1701.) Whether the words, acts and conduct of the parties prove it or not, is for the triers of fact to determine. (1 Pars. Cont. 581; House v. Fort, 4 Blackf. 293–6; Duffee v. Mason, 8 Cow. 25; Foster v. Estate of Caldwell, 18 Verm. 176; Bradford v. Bush, 10 Ala. 386; Tuttle v. Brown, 4 Gray, 457; Humphreys v. Comline, 8 Blackf. 516.)

WAGNER, Judge, delivered the opinion of the court.

The error complained of is the action of the court in instructing that, upon the pleadings, the plaintiffs had no cause of action and could not recover. The petition was for damages, and alleged that plaintiff purchased of the defendant 847 head of sheep, about 600 of which were ewes, for which he paid four dollars per head; that at the time of making the purchase, and as an inducement

thereto, defendant represented to plaintiff that none of the ewes were with lamb; and that plaintiff, relying upon that representation so made, was induced to purchase them; that at the time he purchased the ewes there were at least 575 of them with lamb; and that, in consequence thereof, they were in a great degree valueless to him, whereby he was injured, etc.

The petition set out a good cause of action. It stated a representation by the defendant on which the plaintiff relied, and which induced him to make the purchase. (Carter *et al.* v. Black, 46 Mo. 384.)

Judgment reversed and the cause remanded. The other judges concur.

THE STATE OF MISSOURI *ex rel.* JAMES A. HENDERSON, ON INFORMATION OF A. J. BAKER, ATTORNEY-GENERAL, Relator, *v.* THE COUNTY COURT OF BOONE COUNTY, Defendant.

PER CURIAM.

1. *Courts, judge of* de facto *—Judge of—Unlawful courts, acts of.*—Although a private individual without authority assumes the office of judge of a court which has a legal existence, yet its acts will not for that reason be void. But where there is no law authorizing such court to be held, and the judge assumes to create a court and preside over it, the tribunal so created and all its proceedings will be absolutely void.
2. *Probate Courts — Special acts creating, not unconstitutional.*— The act of April 1, 1872, creating the Probate Court of Boone county, is not obnoxious to section 27, article IV, of the State constitution, as being in the nature of a special enactment.

   1. The question whether or not "provision can be made by general law" for such a court, contemplated by that section, is, under a proper construction of the law, one for the Legislature to determine for itself.

   2. Aside from that section, the Legislature had the right to establish a Probate Court under the general power granted by section 1, article VI, of the State constitution, authorizing it "to establish inferior tribunals from time to time, as they might be needed." Under this latter section the Legislature is to judge of the time when the exigency demanding such a court may arise.
3. *Office without an incumbent, vacant.*— Under the act of April 1, 1872, the Probate Court of Boone county being begun June 1, 1872, but the election of its judge being postponed till the general election in the following November, there existed in the meantime a vacancy in the office of judge of that court which might be filled by appointment from the governor. An existing

office without an incumbent is vacant within the meaning of the constitution, and can be filled by the governor by appointment, unless an election or some other mode is plainly indicated.

Per BLISS, Judge.

1. *Special legislation — Remedy.*—Section 27, article IV, of the State constitution, prohibiting special legislation, is directory, binding upon the conscience of legislators; but if disobeyed, the courts cannot furnish the remedy.

Per WAGNER, Judge, dissenting.

1. *Boone Probate Court — Law creating, unconstitutional — Supreme Court bound to so declare.*— The act creating the Boone County Probate Court is in conflict with section 27, article IV, of the State constitution.

1. The act creating the St. Louis Court of Criminal Correction was upheld as being found to be in point of fact absolutely necessary in a large city like St. Louis (State v. Ebert, 40 Mo. 196), and the law authorizing cities, towns and villages to organize for school purposes, with special privileges, was held valid on the ground that the act was as general as was consistent with its scope and design, and was coextensive with the State. (State *ex rel.* Dome v. Wilcox, 45 Mo. 458.) That case decided that, had the act applied to certain specified towns and corporations, it would have been unconstitutional. But there was no necessity for the act creating the Probate Court of Boone county. There is no reason why courts for the administration of probate business should not be created under a general and uniform law. And a decision sustaining this special law would nullify the State constitution, and blot out one of its most important provisions.

2. It is not within the sole discretion of the Legislature to determine whether these special statutes are demanded. But it becomes the duty of the Supreme Court to decide, on a case presented, whether, under the existing facts, the laws are in conformity to the constitution. To leave the matter entirely within the discretion of the legislature would be to render the prohibition against special legislation practically a dead letter.

2. *Boone Probate Court, act touching—Section 1, article VI, of the constitution does not authorize.*— Section 1, article VI, of the State constitution does not authorize the passage of the act creating the Probate Court of Boone county. The effect of that section is simply to invest the Legislature with power to establish inferior courts, but their establishment must be in conformity to the constitutional requirement; *i. e.*, they must be authorized by a general law and be uniform throughout the State.

For statement of case see dissenting opinion of Judge Wagner.

P. E. Bland, with *A. J. Baker*, for relator.

I. The act of the general assembly of April 1, 1872, creating the office of Probate Court for Boone and other counties, is not in violation of section 27, article IV, of the State constitution.

The general prohibition in the latter clause of said section has reference to the whole section, and embraces those subjects that are of the same general class as those already enumerated in the first clause, and comes within the doctrine of *ejusdem generis* as settled by this court in The City of St. Louis v. Laughlin, 49 Mo. 559. Without the application of this well-settled doctrine of *ejusdem generis* to the general clause of this section, the framers of the constitution would have committed the egregious folly of embodying in the fundamental law of the State a principle which would necessarily operate to create an iron conformity throughout the State, of relief as applied to circumstances and interests most widely dissimilar; and, without any possible good resulting therefrom, would have either deprived the people of the more wealthy and populous counties of the judicial facilities absolutely required by them, or required of more sparsely settled and poorer counties the burden of supporting a system of which they had no need.

II. The next question is, was there a vacancy in the office of probate judge in Boone county after the first of June, 1872? that being the day fixed by law for the act of April 1, 1872, to take effect. The act did not create a new office. It simply detached from the County Court of the counties named in the act a part of their jurisdiction as conferred by the General Statutes, to-wit: probate jurisdiction, and conferred it upon another officer to be styled the "judge of the probate court." After the act took effect there was an office of probate judge without any incumbent, and no such incumbent could be elected prior to the general election. The performance of very important duties required of that officer might be required *ad interim*. But the County Court, neither by its justices or clerk, could any longer perform these duties.

III. The third and last question is, was it the duty of the governor to fill this vacancy by appointment? This duty is made clear by section 8, article v, of the State constitution. (Wagn. Stat. 50.)

H. C. Pierce and *W. Gordon*, for defendant.

I. The act establishing Probate Courts in Boone and other counties is a special law, enacted in a case for which provision is required to be made by a general law. It is in violation of article IV, section 27, of the constitution of Missouri, and therefore null and void. (See 45 Mo. 464; 5 Ind. 557; 10 Ind. 72; 40 Mo. 186; 48 Mo. 468.)

II. Although the act aforesaid took effect from and after June 1, 1872, yet it is plain from section 21 of same act, that no court was contemplated to be held by virtue of said act until January, 1873. No vacancy, therefore, existed at the time the governor appointed said Henderson.

III. This is not a case in which the governor is authorized to fill a vacancy under article V, section 8, of the constitution of the State of Missouri. That section says "when any office shall become vacant," etc. In this case the office of probate judge was never filled under said act by election, and hence it could not have become vacant.

IV. The Boone County Court had jurisdiction of probate matters, even under said act, until January, 1873.

ADAMS, Judge, delivered the opinion of the court.

1. The first question presented by this record is the constitutionality of the act of the Legislature establishing a Probate Court for Boone county. It is urged that the Legislature is prohibited from passing such an act by the provisions of section 27 of article IV of the constitution of this State. The section referred to, after enumerating many cases where the Legislature is positively prohibited from passing a special law, contains this clause: "The general assembly shall pass no special law for any case for which provision can be made by a general law, but shall pass general laws providing, so far as it may deem necessary, for the cases enumerated in this section and for all other cases where a general law can be made applicable." The new constitution containing this section took effect the fourth day of July, 1865. Since that time the Legislature, by special acts, has created in various parts

of the State many Probate and Common Pleas Courts. These courts have been in full operation for many years, and have transacted a great deal of business, and are still transacting business. Large investments have been made, and titles to property acquired and transferred, on the faith that these courts were legally established, and that their acts and proceedings were valid. If they have no legal existence, all their acts and proceedings are *coram non judice* and absolutely void. A tribunal for the transaction of judicial business can only be created by the supreme power of the State. No person on his own motion has the power to erect himself into a court. He may without any authority assume the office of judge of a court which has a legal existence, and preside as such, and all the acts of a court presided over by him will be valid. But where there is no law authorizing such court to be held, and the judge assumes to create a court and preside over it, the tribunal so created and all its proceedings are absolutely void. Can the office of judge of a court be assumed where there is no such office and no such court in existence? Such a proposition seems to me to be wholly untenable.

Can there be such a thing as a *de facto* court where there is a rightful government? If the government itself is a usurpation, as long as such government lasts the courts established by it are *de facto* courts, because the only existing government is *de facto;* and when the rightful government is restored, the acts of such courts, as a matter of necessity, must be held to be valid. That is not the case in a rightful government. The authority to establish the court must emanate from the supreme power, otherwise the court itself is an absolute nullity and all its proceedings utterly void. In the State of Maine a probate judge assumed to hold a court at a place where he was not authorized by law to hold this court, and even in such case the Supreme Court of that State held the acts of the court a nullity. (See 27 Me. 114.)

These observations belong to the cause, and are not made because I consider the act of the Legislature irreconcilable with the constitution, but to indicate the deep magnitude to the people, as well as to individuals, of the question presented by this record. In Illinois the Supreme Court of the State refrained from looking

into the constitutionality of certain acts of a local character on account of the long-continued practice of the Legislature and the far-spread ruin it would produce to declare them void. (See Johnson v. Joliet & Chicago R.R. Co., 23 Ill. 202.) We are not without authority in support of the constitutionality of this law. So far as legislative action can give sanction to such a law, it has received it from the uniform practice of the Legislature ever since the constitution was framed. It has also received the sanction of this court in the many cases which have been brought here from those courts by appeal and writ of error, in which solemn judgments have been pronounced without objection, and which would be void if the court of original jurisdiction had no legal existence. In the case of The State v. Ebert, 40 Mo. 186, this court sustained the act creating the St. Louis Court of Criminal Correction and providing for the trials of misdemeanors by information, on the ground that it was necessary in a large city like St. Louis. So in the case of The State *ex rel.* Dome v. Wilcox, 45 Mo. 458, the same question was raised and decided in the same way in regard to the statute authorizing cities, towns and villages to organize for school purposes. How was it any more necessary in these cases to resort to special laws than in the cases of Common Pleas Courts and Probate Courts? Either class of enactments might be supplied by general laws, but the special laws are deemed much better, and therefore are considered necessary. Who is to decide when such necessity arises? The word "necessary" admits of all degrees of comparison. But a special law is scarcely absolutely necessary in any case, as in almost every case the particular end in view might be attained by a general law. The Supreme Court of Indiana, in the case of Thomas v. Board of Commissioners, 5 Ind. 4, stood upon the superlative degree and required the strictest construction of a similar clause in the constitution of that State, and said that in no case could a special law be resorted to where a general law would cover the case. I cannot see the force of the reasoning of the Indiana court in this case, and indeed the authority of the case is very much shaken, if not entirely set aside, in a subsequent case, where an act creating a new judicial circuit was upheld. (See Stocking

v. The State, 7 Ind. 328.) It will be observed that the Indiana constitution, like our own, inhibited certain local and special acts of legislation, and then in a subsequent section (§ 23, art. IV) it was provided that all laws should be general whenever a general law could be made applicable. In speaking of the law creating the judicial circuit, the court said: "This does not seem to us to be such a case, and even if we doubted we should be bound to throw the benefit of our doubt in favor of the constitutionality of the law."

If the court had been governed by the reasoning in the fifth volume, this law would have been set aside as unconstitutional, because there is no doubt the new circuit could have been provided for by framing a general law. Afterwards, in 1868, the Supreme Court of Indiana, in an able opinion delivered by Elliott, Judge, reviews the case in 5 Ind. and expressly overrules it. But who is to decide when a general or a special law will answer the best purpose? It strikes me that this rule, in reference to general or special laws, is laid down as a guide for the Legislature, and the Legislature is to judge of the necessity of the particular case. The Legislature is quite as able to do this as the courts. The Legislature must, in the first instance, exercise their discretion as to the necessity of a special instead of a general act. How can the courts control that discretion? If a discretion be conceded at all, in my judgment the courts have no right to control it.

It is agreed that there is no discretion in regard to the passage of certain enumerated laws. They are inhibited by the letter of the constitution. When the Legislature undertakes to pass these inhibited laws, it is the plain duty of the courts to declare them unconstitutional. But here we are asked to pronounce upon the necessity of a law, and whether it can be better supplied by a general law than a special act. This is the exercise of the discretion of the court to control the discretion of the Legislature. I am not satisfied that this can be done. In The State v. Hitchcock, 1 Kan. 178, it was held that their constitutional provision, that "*in all cases where a general law can be made applicable, no special law shall be enacted*," left a discretion with the Legislature to determine the cases in which special laws

should be passed, and this discretion could not be interfered with by the courts. This doctrine, it seems to me, is supported by reason and the weight of authority.

But there is another clause in our constitution which may be invoked to uphold the authority of the Legislature to pass this law. By section 1 of article VI it is provided that "the judicial power as to matters of law and equity shall be vested in a Supreme Court, in District Courts, in Circuit Courts, and in such other inferior tribunals as the general assembly may from time to time establish." Here the authority is expressly given without limitation to establish inferior tribunals "*from time to time.*" It is not intended that they should all be established at one session or by one act, but "from time to time," as they may be needed. Some counties may need a Common Pleas Court, a separate Probate Court, or a Criminal Court, while others are too sparsely settled to need them. Who is to judge of the time when the exigency arises? Is not this discretion expressly left to the general assembly by this clause of the constitution? How can the courts undertake to control this discretion? Whatever may be said in reference to other special laws, the power is necessarily implied, if not expressly given, by this clause of the constitution, to establish inferior tribunals by special acts. I feel satisfied that the act under consideration is not unconstitutional.

2. The next question is, was there such a vacancy in the office of judge of this court as to authorize the governor to exercise his power of appointment? The act vests the exclusive jurisdiction of probate matters in this court, and it took effect the first day of June, 1872, but postpones the election of a judge until the general election in November. Who is to transact probate business in the meantime, unless a judge be appointed to fill the vacancy? The language of the constitution is, "when any office shall become vacant," etc., the governor may fill the vacancy. This is a new office created by this act, and *ipso facto* becomes vacant in its creation.

An existing office without an incumbent is vacant within the meaning of the constitution, and can be filled by the governor by

appointment, unless an election or some other mode is plainly indicated. (See Stocking v. The State, 7 Ind. 326.)

In my opinion a judgment of ouster must be entered against the defendants.

SEPARATE OPINION OF JUDGE BLISS.

In concurring with the result to which Judge Adams has arrived, I do not concur in all his views. It may or may not be that the proceedings of the several courts called into being in contravention of the constitutional clause under consideration would be held to have been void. That matter I have not specially considered, and it is unnecessary to express any opinion upon it. I should, however, imagine that a difference would be found between the acts of a court organized in good faith and under the forms of law, and which the Legislature had the power to organize, but failed to comply with a constitutional requirement in exercising the power, and of one that existed merely in usurpation and without color of legality. A doubt, however, upon this question would greatly increase my hesitation in giving an opinion that should affect the multitude of local courts called into being by special enactment.

As to the object of the provision against special legislation I entertain no doubt. I agree with Judge Wagner that its design was to stop just such legislation as the act organizing a Probate Court in Boone county, and other acts of a like nature. The evil is great, and especially when legislation gives diversity of jurisdictions in the several counties. It is an evil which has always been endured to some extent, but which has greatly increased since the constitutional provision designed to cure it. It would seem that our law-making body was unconscious of its obligation to conform its action to the requirements of, and respect the restrictions imposed by, the organic law.

But I am not satisfied that we have the power to remedy the evil. Some body or tribunal must decide in each case whether the object can be provided for by a general law. In some States, under a similar provision, it is held that the courts may pass upon this question, while in others the decision is referred to the Legis-

lature alone. When the prohibition is absolute it cannot be evaded, and should be enforced by both the Legislature and the judiciary. When it is limited and conditional, and upon a question upon which judgment must be exercised and an opinion formed, the argument is certainly plausible that the body called upon to act must exercise that judgment.

It is seven years since the constitution went into operation. During every session of the Legislature it has construed, and, as I understand it, violated, the provision under consideration. The people have acquiesced in the lawfulness of its action and conformed their public business to it; the courts have treated it as legal and obligatory; and thus a practical construction has been given to the clause which should have its weight, and, in a doubtful case, be decisive.

I must, therefore, treat the clause as directory, binding upon the conscience of legislators, but, if disobeyed, the courts cannot furnish the remedy.

DISSENTING OPINION BY JUDGE WAGNER.

The Legislature passed an act, which was approved April 1, 1872, establishing Probate Courts in eight counties, the county of Boone being one of the number. The act was to take effect and go into operation on the first day of June next after its passage, and at the ensuing November election, judges for the respective courts were to be elected. No provision was made for filling the office of judge prior to the time designated for the election. Under these circumstances the governor deemed that there was a vacancy, and proceeded to fill the same by appointment. A judge was duly appointed and qualified in the county of Boone, who demanded of the County Court the books, papers, etc., belonging to the office of probate; but the County Court refused to deliver the same, and continued to exercise probate jurisdiction, denying that the probate judge appointed by the governor was a legal officer; and this proceeding was instituted to test their right to hold and retain the before-mentioned jurisdiction.

Two questions are presented by the record. The first is, whether the establishment of the court was constitutional; and the second

is, if constitutional, had the governor power to appoint? On the part of the County Court, it is contended that the law is invalid because it violates section 27, article IV, of the State constitution. That section, after specifically prohibiting the passage of certain acts, declares that the general assembly shall pass no special law for any case for which provision can be made by a general law; but shall pass general laws providing, so far as it may deem necessary, for the cases enumerated in the section, and for all other cases where a general law can be made applicable.

While this provision has incidentally been before this court on former occasions, it has never been presented in a shape requiring the same consideration that is here demanded. In arriving at a correct conclusion and making a construction, courts must look to the history of the times, and examine the state of things existing when the constitution was framed and adopted; to ascertain the old law, the mischief and the remedy.

When there was no restraint, special legislation was one of the great evils of the day. Aside from its vicious influence on the legislative body, it produced inextricable confusion in the business affairs of the community. Laws were diverse and contradictory in adjoining counties, and a person going from one county to another, before he could transact his business, had to familiarize himself with some special or local act. In nothing was this practice more strikingly exhibited than in the organization of local courts with special jurisdictions. In attending to a particular class of litigation in adjoining counties, resort would sometimes have to be had to a different character of court in each county. Inferior courts were established and multiplied in remote and sparsely-settled counties, where they were unnecessary and useless. It was to strike down this great mischief, and produce uniformity, that the provision was inserted in the constitution. By common consent it was regarded as one of the wisest features incorporated in that instrument. No one will dissent from the conclusion that the greatest harmony that can be attained in the judicial system is highly desirable. The injunction is that no special law shall be passed where a general law can be made applicable.

In the case of The State v. Ebert, 40 Mo. 186, we upheld the act creating the St. Louis Court of Criminal Correction and providing for the trials of misdemeanors by information, on the ground that it was necessary in a large city like St. Louis. The amount of crime and petty misdemeanors existing there made a demand for it. They required prompt and summary punishment, and the other courts were inadequate to furnish the proper remedy. But such a law would be unnecessary in other portions of the State, and would be inapplicable.

The question was again raised in The State *ex rel.* Dome v. Wilcox, 45 Mo. 458, where it was contended that the statute authorizing cities, towns and villages to organize for school purposes, with special privileges, was invalid because it was not general and applicable to all. But we decided that the law was as general as was consistent with its scope and design, and no law more general could be framed to effectuate the object in view. It was, however, distinctly announced that the special statutes referred to in the constitution were such as related to individuals or particular localities; and that, had the act applied to certain specified towns or corporations, it would have been in conflict with the organic law.

In Indiana, under a similar constitutional provision, the Legislature enacted a law authorizing the re-location of a county seat of justice, and, among other things, appointed commissioners to re-locate the same. The Supreme Court held the act clearly unconstitutional. The court, in their reasoning, say that it was very evident that to prohibit special legislation was a prominent object of the convention that framed the constitution, and that the members of that body intended to limit the action of the Legislature, relative to the enactment of local or special laws, in strict conformity to the manner therein prescribed. They then make the inquiry, can such a case as the one before them be made the subject of a general law? To which they respond: "The solution of that question is not difficult. It is not within the sphere of judicial action to point out the features of any law; that, indeed, would be trending upon legislative grounds. But the record presents a case—the re-location of a seat of justice.

To apply the law to the case before us is a proper exercise of a judicial power; and that being done, we do know that to such a case a general law can be aptly applied. Let any one at all acquainted with the forms of legislation attempt to draw up a general law on the subject, and he will soon find that the thing can certainly be done. The mere suggestion that probable inconvenience might arise in the execution of such a law, can have no weight against the manifest intent of the constitution." (Thomas v. Board of Commissioners, 5 Ind. 4.) In subsequent cases the court went even further in giving this clause in the constitution a strict construction.

Decisions from other States, where the same constitutional prohibition exists, might be cited, showing a uniform exposition in reference to the provision. The words in the constitution must be taken in their natural and ordinary meaning. Marshall, C. J., in relation to the constitution of the United States, says: "The framers of the constitution and the people who adopted it must be understood to have employed words in their natural sense, and to have intended what they said." (Gibbons v. Ogden, 9 Wheat. 188.)

Bronson, J., in The People v. Purdy, 2 Hill, 31, which was subsequently approved in the Court of Errors, and cited with marked approbation by the Court of Appeals in Newell v. The People, 3 Seld. 9, declares that "written constitutions will soon become of little value if their injunctions may be lightly overlooked, and the experiment of settling a boundary to power will prove a failure."

Again, in the same case in the Court of Errors, in adopting Judge Bronson's opinion, it is said: "If the courts venture to substitute for the clear language of the instrument their own notions of what it should have been, or was intended to be, there will be an end of written constitutions." (Purdy v. The People, 4 Hill, 384.)

In construing the language of the constitution, courts have nothing to do with the argument from inconvenience. Their sole duty is to declare, *ita lex scripta est* — thus saith the constitution. (21 Wend. 584.)

As the Legislature is prohibited from passing any special law in any case where provision can be made by a general law, the question is whether a general law could be made applicable. It seems to me that to state this question is to answer it in the affirmative.

The main principles of law governing probate matters are the same throughout the State. There is no reason why a uniform system of tribunals should not be established for the administration of that law. That there are different amounts of business to do in different counties is true, and the same thing may be said of the Circuit Court, but that furnishes no argument against a general law requiring uniformity. By reference to our legislative enactments it will be seen that these special courts have been instituted in some of the smallest counties in the State, where there was the least necessity for them. In the very act which we are now passing upon, one of the counties in which a special court is established is Maries, which is one of the least populous counties in the State. To say that a general law which is sufficient for most of the counties in the State cannot be made applicable to these counties, appears to me most singular. We know, as an historical fact, that for many years the State got along with a general system, and these special courts were almost unknown, and no evil was experienced in consequence thereof. If the system which previously obtained is defective it is susceptible of amendment, but the law must be general and uniform. Any one at all acquainted with drafting of bills or with legislative proceedings can readily see how easy it would be to frame a general law on this subject applicable to the whole State.

To sustain this law would, in my opinion, be to practically nullify the constitution and blot out one of its most important provisions. That it is the duty and province of the courts in this instance, as well as all others, to decide whether the law is in conformity with the constitution, I entertain no doubt. The case of The State v. Hitchcock, 1 Kan. 178, is the only authority I have been able to find which holds that the enactment of such laws is within the legislative discretion and cannot be controlled by the courts. The contrary view is held in all the States where they have similar

provisions. (*Ex parte* Pritz, 9 Iowa, 33; Davis v. Woolnough, *id.* 106; Hetherington v. Bissell *et al.*, 10 Iowa, 147; Baker *et al.* v. Steamer Milwaukee, 14 Iowa, 217; McGregor v. Baylies, 19 Iowa, 46; Atkinson v. M. & C. R.R., 15 Ohio St. 35.) It seems to me that if the courts concede that the whole matter rests with the Legislature, the result will be a virtual abolition of this clause in the constitution. The prohibition against special legislation will be practically a dead letter. As it is the practice in the Legislature for the members to yield and grant any local measure asked by any representative in that body, it is only necessary to demand a particular enactment for a special purpose, and if there is no constitutional restraint, it is passed as a matter of course. The legislative discretion in such cases extends only to the representations of the member who is interested in the passage of the bill.

Nor do I think that any power is derived in support of this measure from that provision in the constitution which declares that the judicial power shall be vested in the Supreme Court, in Circuit Courts, and in such other inferior tribunals as the general assembly may from time to time establish. The effect of this provision is simply to invest the Legislature with power to establish inferior courts, but their establishment must be in conformity with the constitutional requirement; they must be authorized by a general law, and be uniform throughout the State.

In my opinion, therefore, the act is clearly unconstitutional. Having arrived at this conclusion, I forbear discussing the second point raised by the record.

EVANDER LIGHT, Plaintiff in Error, *v.* EZRA W. KINGSBURY *et al.*, Defendants in Error.

1. *Bills and notes — Indorsement after maturity — Presentment — Notice — Diligence.* — The indorsement of a negotiable note after maturity is equivalent to the drawing of a new bill of exchange at sight, and the same diligence in making demand of and giving notice is required to charge the indorsers. Where such indorsement was on the 19th of April, and the demand and refusal occurred on the 3d of the following July, no excuse appearing for the delay, the indorsers would not be liable.

Error to Kansas City Court of Common Pleas.

S. P. Twiss and *Gage & Ladd*, for plaintiff in error.

M. D. Trefren, for defendants in error.

ADAMS, Judge, delivered the opinion of the court.

The plaintiff sued the defendant Kingsbury as maker, and the other defendants, John Brooks, John G. Thompson and Aaron Raub as indorsers, of the following negotiable note:

"$3,500.00. One day after date, for value received, I promise to pay to the order of Brooks, Thompson & Co. three thousand five hundred dollars, with interest at the rate of ten per cent. per annum until paid. E. W. KINGSBURY.

"Kansas City, January 7, 1869."

The petition alleged that the payees, Brooks, Thompson & Co., composed of John Brooks, John G. Thompson and Aaron Raub, on or about the 19th day of April, 1869, for valuable consideration, indorsed and delivered said note to the plaintiff; that the plaintiff, on the 3d day of July, 1869, demanded of said Ezra W. Kingsbury the amount due by said note, who refused to pay the same; and that plaintiff, on said 3d day of July, 1869, duly notified the defendants, Brooks, Thompson & Co., of said demand upon said Kingsbury for payment of said note and of his refusal to pay the same.

The defendant Kingsbury filed no answer. The answer of the other defendants denies due presentment and notice, and denies that any indorsement in fact was made; that the indorsement was simply in blank, and made as a receipt; that the defendant Kingsbury paid the note to them and requested that they should indorse their names in blank, as and for a receipt of payment, which they did.

The case was submitted to a jury, and they found a verdict for the defendants. The evidence was conflicting, and tended to establish the views of both parties. Various instructions were asked, and some were given and some refused. But the law, as presented by the issues, seems to have been fairly laid down by the instructions that were given.

But it is unnecessary to review any of the positions assumed by counsel in this case, as the petition on its face does not state facts sufficient to constitute a cause of action against the defendants as indorsers of this note. It is a negotiable note, indorsed after due. Such indorsement is equivalent to drawing a new bill at sight, and the same diligence in making demand and giving notice is required to charge the indorsers. (See Davis v. Francisco, 11 Mo. 572, opinion of Scott, J.; also Moody *et al.* v. Mack, 43 Mo. 210; Berry v. Robinson, 9 Johns. 121; McKinney v. Crawford, 8 Serg. & R. 351; Rugby v. Davidson, 2 Mills, Con., 33.)

The petition alleges that the indorsement was made about the 19th of April, and alleges a demand and refusal on the 3d of July following, and gives no excuse whatever for the delay. Even if this petition could be held good after verdict, there was nothing in the evidence to justify the delay in presenting the note for payment, and the indorsers were discharged by such delay.

Judgment affirmed. The other judges concur.

MRS. JOHNNIE WHITE AND W. S. MATHEWS, ADMINISTRATORS OF WILLIAM T. WHITE, Respondents, *v.* EPHRAIM DAVIS, Appellant.

1. *Sheriff's deed — Title conveyed by.* — A sheriff's deed operates only on the existing title, and does not pass a subsequently acquired title.

Appeal from Pettis Court of Common Pleas.

H. B. Johnson and *James S. Botsford*, for appellant.

F. P. Wright, for respondents.

ADAMS, Judge, delivered the opinion of the court.

This was a suit for partition. The answer denied that plaintiff had any title in common or otherwise with defendant. The plaintiff, to maintain his case, introduced a sheriff's deed made to him in 1869, on a judgment and execution against H. L. Maynard,

and then introduced a deed purporting to have been made in 1867, by J. W. Harding and wife, to the defendant Davis and the said H. L. Maynard. But the evidence in reference to this deed was that in July, 1867, Davis and Maynard, with Harding, applied to A. O. Crandall, an attorney at law in Sedalia, to draw the deed, which he did; and Harding, who lived in Cass county, was to have the deed properly executed and acknowledged and sent back to Crandall, to be delivered to Davis and Maynard. Harding took the deed and had it acknowledged before a justice of the peace in Cass county, and sent it back to Crandall. As it was not properly acknowledged, it would not be received as duly executed, and the deed remained in this incomplete state for some two years in the hands of Crandall. After the plaintiff made his execution purchase, he applied to Crandall for this deed, and Crandall gave it to him to be returned to him, which he promised to do. He took the deed to Cass county, and procured Harding and wife to make their acknowledgment before the proper officer. He did not, however, return it to Crandall, but had it recorded, and when so recorded it was delivered back to plaintiff by the recorder and produced by him on the trial of the case.

It is manifest from this evidence that there was no complete execution or delivery of the deed from Harding and wife to Maynard and Davis until long after the plaintiff purchased at execution sale. Whatever title Maynard had at the time of the execution sale vested in the plaintiff by the sheriff's deed. Whether he had any equitable interest, or whether such equity was vested in Maynard's wife, it is unnecessary now to inquire. It is sufficient to say that at the time of the execution sale Maynard did not have the legal title to any part of this land. A sheriff's deed operates only on the existing title, and does not pass a subsequently acquired title. When a grantor undertakes to convey to the grantee an indefeasible estate in fee simple absolute, and has not at the time the legal title to the estate sought to be conveyed, but afterwards acquires it, the legal estate so acquired immediately passes to the grantee. (See Wagn. Stat. 135, § 3.) A sheriff can convey only such interest as the defendant has at the time of the sale, and he has no power to undertake to convey a fee simple

absolute when the defendant in the execution has no such estate vested in him.

Before the plaintiff can maintain a suit for partition he must first obtain the legal title. As the legal title has not yet been vested in him, he has no standing in court.

Judgment reversed and petition dismissed. The other judges concur.

ASA B. CROSS AND GEORGE W. RIPPEY, Defendants in Error, *v.* BENJAMIN L. RIGGINS, Plaintiff in Error.

1. *Attorney and client, communications between — Construction of statute.*— The rule which excludes testimony of professional communications between attorneys and clients is broad enough to embrace a case where the one seeking counsel pays no fee and employs other attorneys in the prosecution of the business, and even where the lawyer consulted is afterwards employed on the other side.

   The term "client," as used in the statute (Wagn. Stat. 1374, § 8), should be understood in its most enlarged sense, and the prohibtion should close the mouths of all who have listened to disclosures looking to professional aid.

Error to Kansas City Court of Common Pleas.

Gage & Ladd, for plaintiff in error.

The court erred in excluding the testimony of William Douglas. The conversation was not a confidential communication. The relation of attorney and client never existed between plaintiffs and witness, and the rule of privileged communication as between attorney and client is strictly confined to cases in which the relation exists and to the time during which that relation continues. No statements made prior or subsequent to the relation are privileged, but only those made within the relation. A conversation with a view to the employment of an attorney is not an employment. (Foster v. Hall, 12 Pick. 89; Yordan v. Hess, 13 Johns. 492; Cobden v. Kendrick, 4 T. R. 432.)

Wm. E. Sheffield, for defendants in error.

The testimony of Douglas was inadmissible. (Foster v. Hall, 12 Pick. 89, and cases cited; Greenough v. Gaskell, 1 Mylne & K.

102, 103, per Lord Brougham; Parker v. Carter, 4 Munf., Va., 273; 1 Graham's Pr. 212; Betzhoover v. Blackstock, 3 Watts, 20; Cowan & Hill's notes to Phil. Ev., 3d ed., note 139, 162; 2 Stark. Ev. 319 *et seq.*; 1 Greenl. Ev., § 237–8, notes; Johnson v. Sullivan, 23 Mo. 474; Hull v. Lyon, 27 Mo. 570; The Bank of Utica v. Merserau, 3 Barb. Ch. 595 *et seq.*; Williams v. Fitch, 18 N. Y. 546.)

BLISS, Judge, delivered the opinion of the court.

Plaintiffs were lumber dealers in Kansas City, and count upon a bill of lumber sold defendant for building a house. That the lumber was furnished is not denied, but defendant claims that it was furnished his contractor. Upon the trial, Mr. Douglas, of the firm of Douglas & Gage, attorneys, testified: "Some time in 1866, A. B. Cross approached me on the street and stated the facts about this case and asked my opinion, and I told him I could not give my opinion without looking at the statute touching mechanics' liens." Cross testified that he stated his case to Mr. Gage and intended to employ him; had employed him before, but he went away; that he stated the case to Mr. Douglas and asked his opinion, but he manifested so much indifference that he did not go back to him. Mr. Douglas was offered as a witness as to the declarations of Cross to him, but the objection was raised that they were confidential communications made to him in a professional character and could not be disclosed, and the objection was sustained.

Among the persons disqualified to testify, the statute (Wagn. Stat. 1374, § 8) enumerates "an attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the consent of that client." In Hull v. Lyon, 27 Mo. 570, where two adverse parties counseled with an attorney and made disclosures to him, he was not permitted to give in evidence the declarations of either, although they were not private, but made to the other party as well. In Johnson v. Sullivan, 23 Mo. 474, testimony as to declarations to an attorney was forbidden, although judicial proceedings were not commenced or contemplated. I cite these cases to show that our statute is held to

embody the stricter rule of the common law upon this subject — a rule that excludes from the forum evidence of all declarations made to counsel in order to solicit professional advice, without regard to the institution or defense of a suit.

The present record presents the question whether one who seeks counsel, but who in fact pays no fee, and employs others in the prosecution of the business — the counsel consulted being afterwards employed against him — can be so considered as a client that his communications are privileged. I know not where to draw a distinction. The rule should be universal, and apply to all who communicate facts, expecting professional advice, or it will fail to answer its ends. Its limitations may be unknown to laymen, and without feeling perfect freedom in all cases, instead of the perfect confidence that should exist, the intercourse might be restrained by fear and marred by dissimulation on the part of the client, and the object of the rule be defeated; and besides, a door would be opened to fraud. One might seek advice, expecting not only to pay but to retain in an anticipated litigation, and, after his story had been heard, the retainer might be declined and the information be used against him; also an obstacle would be thrown in the way of the settlement of disputes. The noblest office of the lawyer is to heal difficulties, and far more is done in that direction in the higher walks of the profession than is known to the public. In seeking this end counsel may receive communications from the opposite party, and not made under circumstances that would exclude them as propositions to compromise. The conventionalities that hedge in the English counsellor are unknown in this country, and public policy requires that persons should feel that they may securely say anything to members of the profession in seeking aid in their difficulties, although the person whose advice they seek may have been employed, or may be afterwards employed, against him. The term "client," then, in the statute, should be used in its most enlarged sense, and the prohibition should close the mouths of all who have listened to disclosures looking to professional aid.

The petition charges the defendant as purchaser, and the answer denies such purchase. After the evidence was in, the defendant

claimed that it showed a guarantee rather than a purchase, and asked for instructions that certain facts would make the defendant a guarantor, and as such he could not be charged in the action. It would have been well enough to have given these instruction, as the defendant had a right to claim that the evidence proved facts that would only make the contract one of guaranty. But this was no error for which we should reverse the judgment, and principally because the instructions refused are negatively implied in those given. The jury were told that in order to give plaintiff a verdict they must find certain facts, which must exist to constitute an original undertaking that would be inconsistent with the relation of guarantor. If they found these facts to be true, defendant of course could not hold the latter relation; and if they did not find them to be true, they must find for defendant, and it practically would not matter to him upon what theory he should obtain a verdict.

The instructions given are sharply criticised, but I fail to find the errors so apparent to counsel. It is one of those cases where good men may differ upon the facts. The plaintiffs have obtained two verdicts, and the interests of justice do not demand another trial.

The other judges concurring, the judgment will be affirmed.

J. K. MANSFIELD *et al.*, Defendants in Error, *v.* SYLVESTER FULLER *et al.*, Plaintiffs in Error.

1. Mandamus — *Registrars, posse to protect — Remedy will not lie. — Mandamus* will not lie against the judges of a County Court to compel them to audit for payment the claims of a sheriff's *posse* employed, under the act of 1868 (Wagn. Stat. 1157, § 37), to protect the board of registration in the performance of their duties, before the claims have been reduced to judgment.

Mandamus is an extraordinary writ, and will issue only when the applicant has no other specific remedy.

Error to Vernon Circuit Court.

F. P. Wright, for plaintiffs in error.

Johnson & Botsford, for defendants in error.

BLISS, Judge, delivered the opinion of the court.

The plaintiffs sued out of the Circuit Court a writ of *mandamus* against the defendants as judges of the County Court of Vernon county, commanding them to audit and pay their accounts for services and expenses as a sheriff's *posse* in protecting the board of registration in the performance of their duties under the registration act of 1868 (Wagn. Stat. 1157, § 36), or show cause, etc. The accounts were shown to have been presented and rejected; they were severally adjusted by the Circuit Court, and a peremptory writ was ordered, from which defendants appeal.

We need only consider the right of the plaintiffs to resort to this remedy. *Mandamus* is one of those extraordinary writs that will issue only when the applicant has no other specific remedy. (State v. Howard County Court, 39 Mo. 375; Moses on Mand. 14.) It is never resorted to to enforce the payment of a debt when it can be collected by suit, unless the tribunal having jurisdiction refuses to act, in which case the order will be not to render a specific judgment, but to proceed with the cause.

The writ is often issued to the auditor of State, requiring him to audit demands against the State that have been provided for by law. The State cannot be sued, and the claimant has no other remedy. So *mandamus* may be properly issued to judges of County Courts to perform their duty, when no judgment can be obtained against the county. In The State v. Saline County Court, 48 Mo. 390, the obligation to pay the bonds then under consideration was not upon the county of Saline, or upon any municipal or *quasi* corporation that could be sued. The statute pointed out a specific mode by which they could be met, to-wit: by the assessment of taxes upon a certain section of the county; and the only specific remedy the holder of the bonds could have would be by *mandamus* to compel the assessment. So in The State v. Bollinger County Court, 48 Mo. 475, the relator had no claim upon the county, but only upon a certain fund in the custody of the County Court. The county, therefore, could not have been sued. In The State v. Treasurer of Callaway County, 43 Mo. 228, the claim enforced by *man-*

damus had been regularly audited by the County Court, but the question of jurisdiction was not raised in that case, and it is no authority upon that point; and the same remark will apply to Flagg v. Mayor, etc., of Palmyra, 33 Mo. 440, and to The State v. Justices of Buchanan County, 41 Mo. 254. It should be also noted that our general railroad act expressly authorizes the writ of *mandamus* upon default by County Court, etc., and the cases in which it has been issued to enforce the payment of railroad bonds furnish no precedent in other cases. (See Wagn. Stat. 307, § 22; Sess. Acts 1855, p. 429, § 35.)

In relation to bonds of cities and counties, issued under acts which provide especially for the assessment of taxes to meet them, but without express authority for this writ, the decisions in other States have been conflicting. In Kentucky it is held to be an appropriate remedy to compel the assessment, although no judgment has been obtained. (Maddox v. Graham *et al.*, 2 Metc. Ky. 56; 11 B. Monr. 154.) So in Ohio. (State v. Commissioners, etc., 6 Ohio St. 280.) In New York, where a suit can be properly instituted, the prevailing doctrine is that the claim must be first reduced to judgment, though there does not seem to be perfect harmony in the cases. (See The People v. Supervisors, etc., 10 Wend. 363; *Ex parte* Lynch, 2 Hill, 45; The People v. Supervisors, etc., 11 N. Y. 563; The People v. Mead, 24 N. Y. 114.) So in Iowa. (Coy v. City of Lyons, 17 Iowa, 7.)

I have not examined the reports of all the States to see what is the general holding in relation to municipal bonds issued as above, nor does it matter so far as the present case is concerned. All agree to the general principle that if the creditor has another adequate and specific remedy, the writ of *mandamus* will be denied, although they may and do differ as to whether an ordinary suit in a particular case is such remedy.

It is not pretended that a private citizen holding an ordinary claim against a city or county can have it adjudicated under a writ of *mandamus*. It must be first reduced to judgment, and if then the proper authority refuses to provide for its payment, the creditor may ask for mandatory process. I do not see how the present relators stand in any different position. They claim

to have been lawfully employed in aid of the registration officers. If so, they are entitled to whatever pay the law provided, either directly or by fair implication. This pay comes from the general revenue of the county. It is not to be provided for in any particular manner, but stands upon the same footing as any other unaudited county indebtedness. I cannot see, then, upon what ground the claimants should be privileged over others and be entitled to the benefit of this extraordinary writ when they have an adequate and specific remedy by action. (The State v. Clay County, 46 Mo. 231.)

The other judges concurring, the judgment of the Circuit Court will be reversed and the petition dismissed.

THE STATE OF MISSOURI, TO USE OF JOSEPH PICKEY *et al.*, Respondents, *v.* JOSEPH M. CULBERTSON *et al.*, Appellants.

1. *Dower, sale of — Proceeds, to whom belonging after widow's death.* — Proceeds derived by a widow from sale of her life interest in the land of her husband, and left at her death, should not be treated as a part of the remainder to be distributed among the heirs of her husband. It was her absolute property, and neither she nor her legal representatives were chargeable with it.

Appeal from Callaway Circuit Court.

Sheley & Boulware, for respondents.

H. C. Hayden and *J. A. Hockaday*, for appellants.

WAGNER, Judge, delivered the opinion of the court.

The main question in this case is whether the court rendered the proper decree in making distribution among the persons entitled to the remainder under West's will. The petition was undoubtedly bad, and at the time the suit was commenced the defendants, who were sureties on Mrs. West's bond, were not liable, as no breach had been committed according to its terms. But as by the subsequent proceedings an apportionment of the money was made by the court, this technical defect may be waived, and justice may be done by an assessment of costs against the plaintiffs.

It seems that Thomas West married a widow named Smith, and that she had children by her former husband, and that he obtained by her some property. Previous to his death he made his will, and by the third clause he made the following bequest to his wife, Mary West: "One-third part of my estate during her natural life, at her death to be divided between her children and mine, according to their respective rights; that is to say, to her children according to the amount I received of Edward Smith's estate, and to my heirs according to the amount she may receive of my estate over what I received by her." After the death of West his heirs brought suit against the widow to compel her to give security for the payment back to them of the one-third which she received under the will of her deceased husband, at her death. The court found that she had received from the executor the sum of $1,100, and ordered her to give bond to secure its repayment to those entitled to it in remainder. The decree provided, and the condition of the bond was, that the legal representatives of Mary West at her death should pay over the sum of $1,100, and any other sum that she might have received under the will of the deceased West, in such manner and proportions as might be ordered and decreed by the Circuit Court or any other court of competent jurisdiction. When this suit was brought no proceedings had been instituted to determine the rights of the respective parties, and until that was done the sureties and legal representatives were not in default. In their answer they denied any breach, and expressed a readiness to comply with their obligations whenever it was ascertained to whom the money should be paid.

It appears also that under the provisions of the will Mrs. West took possession of a piece of land belonging to West's estate, and instead of living on it she sold her life estate in it for $800. With this last amount the court charged her legal representatives, and treated it as a part of the remainder to be distributed among the heirs. In this we think there was palpable error. The land remained and went to the heirs after her decease. The money she received from her life estate was absolutely hers. It was no more a part of the property in remainder than if she had rented the land for a certain number of years and received and used the rent. The

use of the land during her natural life and the interest on the personalty were her absolute property, and neither she nor her legal representatives were chargeable with or accountable for the same. In ascertaining the respective amounts due both the West and the Smith heirs, the money arising from the sale of the life interest in the land should not be taken into the account.

Although we consider the plaintiffs' pleadings bad, yet as the whole matter has passed through the court, and to begin again would consume nearly all the money in costs, justice will best be subserved by ordering the decree amended in conformity with this opinion. The judgment will therefore be reversed and the cause remanded for that purpose. The plaintiffs will pay all the costs in both courts. The other judges concur.

William B. Means, Appellant, *v.* George De La Vergne, Respondent.

1. *Lease, description in, when not void for uncertainty* — Certum est quod, *etc.* — A deed conveying "the dwelling-house now occupied by me, with the usual appurtenances, the well, the smoke-house and garden, together with one-half of the land now in cultivation on the farm now occupied by me, and one-half the orchard and one-half the barn," is not void by reason of its defective description. It sufficiently identified the farm, and parol evidence was proper in order to locate it. Such testimony would not vary or contradict the terms of a written instrument.

Appeal from Henry Circuit Court.

F. P. Wright, for appellant.

The failure to fix monuments, or to give corners and distances, does not render a deed void for uncertainty. (Seaman v. Hogeboom, 21 Barb. 406; 4 Ad. & Ellis, 81.)

Pickerell & Blackford, for respondent.

I. Parol testimony cannot be resorted to to control the meaning of a deed, or give it a different meaning from that which it carries on its face.

II. The lease was properly excluded on account of the uncertainty of its description. It contains no description, or reference to any description, by which a surveyor could find the premises described therein, or the lot in controversy, not even giving the State and county. The description must be contained in the instrument or its references, express or implied, with such certainty that the locality of the land can be ascertained from it. (Nelson v. Brodhack, 44 Mo. 603.)

BLISS, Judge, delivered the opinion of the court.

The plaintiff brought ejectment, and founded his right to enter upon a lease which the court held to be void from defect of description. It appears that he had sold his farm near the town of Clinton, upon which he had resided for many years, to one Boyer, and the latter, as part consideration, executed to him a life lease beginning as follows: "This indenture, made this May 3d, 1865, between Jacob Boyer, Sr., of the town of Bryan, county of Williams and State of Ohio, and William B. Means, of the town of Clinton, county of Henry and State of Missouri, witnesseth: that the said Jacob Boyer, Sr., has this day leased to the said William B. Means the following described lands and premises, to-wit: the dwelling-house now occupied by the said Means, its entire use and control, with the usual appurtenances, the well, the smoke-house and garden, together with one-half of the land now in cultivation, on the farm now occupied by the said Means, and one-half of the orchard and one-half of the barn; to have and to hold the same for their use and benefit during the natural life of the said William B. Means and Maria B. Means, his wife," etc.

This lease was not acknowledged, but upon the trial the plaintiff offered the lease and evidence to show that the land, of which he sought to recover an undivided half, was embraced in that part of the farm occupied by him in Clinton, Henry county, Missouri, then under cultivation, and that defendant purchased of said Boyer with notice. The court, however, held that the description of the property sought to be leased was so vague and uncertain that nothing passed by the instrument, and gave judgment for defendant.

In this the court committed error. *Id certum est quod certum reddi potest.* There is no difficulty in locating the premises described by the deed. Applying the description, which is necessary in all deeds, is very different from contradicting or varying the contents of a written instrument. The intent of the lessor is clear — to demise certain fields which were on the farm then occupied by the lessee, who resided in Clinton. Here is no ambiguity, any more than though the property had been designated by the numbers of a lot, or by being bounded on its several sides by A., B. and C. As the lot sued for did not bear the same description, it was necessary to show by parol that it was embraced in the lands so leased, and this was done.

As the case must be remanded, it is proper to remark that the instructions asked at the former trial, in the question of notice, did not conform to our holdings in Maupin v. Emmons, 47 Mo. 304, and other cases there cited.

Reversed and remanded. The other judges concur.

ELIAS DISNEY, Respondent, *v.* T. B. SUTHERLAND, Appellant.

1. Judgment affirmed.

Appeal from St. Clair Circuit Court.

W. P. Johnson and *E. J. Smith*, for appellant.

F. P. Wright and *J. C. Ferguson*, for respondent.

ADAMS, Judge, delivered the opinion of the court.

The plaintiff, as collector, was a defaulter to the State, and the defendant was one of the sureties on his official bond. The State had issued a distress warrant against the plaintiff and his sureties, and all of the plaintiff's lands were levied on under this distress warrant and were to be sold. The plaintiff alleges in his petition that when matters stood thus, the defendant made an agreement with him that if he would get his wife to join in a deed to defendant for the lands levied on, the latter would at the

sale make them bring $2,300, and also pay off a prior mortgage of $700 on the land, making a total of $3,000. He further alleges that he complied with his part of the agreement by making the deed and placing it in the hands of a third person, to be delivered to the defendant when he bid off the land; and alleges that the defendant at the sale bid only $1,600 and purchased the land at that price, and that the deed from himself and wife was delivered to defendant.

The defendant denied all the material facts stated in the petition, and set up that there were defects in the title to some of the lands. The case was submitted to a jury for trial, and they found a verdict for $550 in favor of the plaintiff. The defendant made a motion for a new trial, which was overruled, and the case is here by appeal.

The case seems to have been fairly put to the jury by the instructions of the court. The evidence strongly tended to prove the case as laid in the petition. There was no error in instructions given or refused, and I see no cause for disturbing the judgment.

Judgment affirmed. The other judges concur.

HENRY LANDES, Respondent, *v.* THE PACIFIC RAILROAD, Appellant.

1. *Carrier, common — Receipt, effect of.* — A receipt for goods, given in the usual form by a common carrier, implies an agreement to transport the goods to their destination if upon the carrier's line.

Appeal from Jackson Circuit Court.

I. N. Litton, for appellant.

H. B. Johnson and *S. D. Twitchell*, for respondent.

BLISS, Judge, delivered the opinion of the court.

This suit was brought against defendant as common carrier for failing to deliver a box of goods shipped at Peoria, Ill., with other goods for Kansas City, Mo., and plaintiff recovered judgment for the value of the contents.

Plaintiff offered the deposition of the freight agent of the O. & M. Railroad, who testified that all the goods were delivered to the defendant at St. Louis, as by the following receipt, which he exhibited as the receipt of defendant:

"ST. LOUIS, January 30, 1866.

"Received from the St. Louis Transfer Company (carrier No. 14), warehouse corner of Second and Carr streets, in good order, on board the Pacific R.R.

Marks.	Articles.	Weight.
	3 chairs.	
W. F. McL.,	1 bbl.	
Kansas City.	1 cider.	1800
	10 boxes.	

Charges $25.40. ROBINSON."

The plaintiff testified to the shipment at Peoria, to the contents of the lost box and their value; that they were his property; that all the other boxes and goods were delivered to him at Kansas City; that he demanded the one in controversy, but the person who delivered the others told him it was missing.

In a motion for a nonsuit, and also when that was overruled, by instructions asked, defendant's counsel claimed:

1. That there was no evidence that the company ever received the goods, as the agency and handwriting of Robinson were not proved. The evidence showed that the freight agent of the O. & M. Railroad, who was constantly doing business with defendant, described the receipt as that of the Missouri Pacific Railroad, and defendant's freight agent at Kansas City in effect acknowledged the receipt of the shipment by delivering the other goods embraced in the same paper, and saying that the one sued for was missing.

2. That if the receipt is considered proved it is not a contract to carry, but a receipt simple. This paper is doubtless in the usual form, and implies an agreement to transport the goods to their destination if upon defendant's line. As common carrier only, it had no right to receive them for any other purpose.

3. That plaintiff was not the consignee, and it was not competent for him to demand them or sue for them. The consignee was not the owner of the goods and had no right to sue for them. When the plaintiff demanded the lost box, it would have been a

good excuse for not delivering it to him if it had been delivered to the consignee. But no such excuse was given, but one, on the contrary, wholly inconsistent with such delivery. The defense is purely technical and wholly without merit.

The judgment will be affirmed. The other judges concur.

NATHANIEL JENKINS, Respondent, *v.* M. L. McCOY, Appellant.

1. *Damages — Crop — Trespass — Measure of damages, etc.* — The grantee of land has no title to a crop cultivated and removed therefrom by a third person. The latter would be a trespasser, but the value of what he removed would not be the measure of damages, and while he harvested the crop he held the actual possession; and, in case the grantee took possession, could have ousted him by an action of forcible entry and detainer, notwithstanding the fact that the person harvesting was a trespasser.

Appeal from Henry Circuit Court.

F. B. Wright and *B. G. Boone*, for appellant.

McBeth & Price, for respondent.

Defendant, being an intruder, cannot show want of title in plaintiff. The possession of plaintiff being proven, is sufficient to maintain trespass. (30 Mo. 442.)

BLISS, Judge, delivered the opinion of the court.

The plaintiff had purchased a farm of one Fisher, and upon it was a growing crop of corn planted by defendant, who removed it after the purchase. This suit is to recover the value of the corn, upon the assumption that McCoy was a trespasser and had no rights in the crop so raised. Much of the record is filled with evidence tending to prove that McCoy had a license from Fisher to enter and plant the crop, but in our view it is unnecessary to consider the evidence and the instructions touching its application.

The plaintiff purchased and moved upon the farm in August, and admitting that defendant was a mere trespasser, does it follow that the crop when matured became the property of plaintiff? The plaintiff has all the rights of Fisher, of whom he purchased,

and if the latter had planted the crop it would pass with the deed, and whoever afterwards should remove it would be liable for its value.

But the land having been planted and cultivated by a stranger, and without the consent of Fisher, would he himself, had he never sold the farm, have any right to the value of the matured crop, had the trespasser succeeded in securing it? I think not. The defendant was a trespasser, but the value of what he raised is not the measure of damages. And besides, in the present case, when the defendant harvested the corn, he was in possession of the field in which it was raised. It had never been abandoned, and no actual possession had been taken by the plaintiff. The constructive possession of title would be good had not defendant been in actual occupancy, which occupancy continued until the crop was removed. Had the plaintiff taken possession he could have been turned out by an action for forcible entry, notwithstanding defendant was a trespasser. (Harris v. Turner, 46 Mo. 438.) I know of no principle that would give him a title to what had been raised and removed, so as to make defendant liable, not for the use of the property, but for the value of the crop.

The plaintiff has been misled by the principle that the purchaser took all that was owned by the vendor, and stands in his shoes. As the vendor himself did not own the corn, neither did he sell it to the plaintiff. The trespasser should never have been suffered to raise and harvest his crop. He could have been ejected at any time. But having been permitted to do so, its value is not the measure of damages.

The judgment is reversed and the petition dismissed. The other judges concur.

WILLIAM L. HUGHES *et al.*, Appellants, *v.* JOHN G. HOOD *et al.*, Respondents.

1. *Lessor and lessee — Covenant to deliver possession, action on — Rule as to damages.* — In an action of damages for withholding possession of leasehold property, where plaintiff had been a non-resident and had removed to this State for the purpose of occupying the premises, he would not be entitled to recover, on the covenant to deliver possession contained in the lease, the amount of his expenses incurred in the removal. He might protect himself against such damages by requiring that a provision to that effect be inserted in the contract. If he fails to do this he can only recover losses which naturally result from its violation.

   In such a suit the true rule of damages would be the difference in the rent as provided for in the lease and the rental value of the premises. And the rental value would be not what the premises might be worth to the plaintiff, but what they would rent for in the neighborhood.

2. *Leases — Suit by lessee against lessor — Covenant to deliver possession — Unlawful detainer — Former recovery — Plea in bar.* — A lessee who is prevented from occupying the leasehold premises by a wrong-doer is not compelled to proceed against him, but may have his action directly against the lessor on his covenant to deliver possession. But where he chooses to sue the wrong-doer for unlawful detainer, and recovers judgment against him for possession and damages for the detention, he cannot afterwards resort to his remedy against the landlord; and in case of such an action the latter may plead the former recovery by the lessee, in bar of the suit.

Appeal from Johnson Court of Common Pleas.

Phillips & Vest, for appellants, cited in argument Mack v. Patchen, 42 N. Y. 167; Sedgw. Dam. 194 and notes, 201; Trull v. Granger *et al.*, 4 Seld. 115; Kelly v. The Dutch Church of Schenectady, 2 Hill, 116; Fisher v. Goebel, 40 Mo. 475; Schlemmer v. North, 32 Mo. 206; Kinney v. Watts, 14 Wend. 38.

Elliott & Blodgett, for respondents, cited Sedgw. Dam. 86; Driggs v. Dwight, 17 Wend. 71; Lawrence v. Wardwell, 6 Barb. 423; Ward v. Smith, 11 Price, 19; Johnson v. Arnold, 2 Cush. 46.

ADAMS, Judge, delivered the opinion of the court.

On the 12th day of February, 1869, the defendants leased to the plaintiffs a farm owned by them in Johnson county for one year, the lease to commence the 1st of March, 1869, at which

time, by the terms of the lease, possession of the farm was to be given to the plaintiffs. When the time arrived to take possession the plaintiffs found a former tenant of the landlord holding over, who refused to surrender the possession, and it was agreed between the plaintiffs and defendants that the plaintiffs should bring a suit for the possession against the tenant holding over, the defendants to pay the attorney's fees. So the plaintiffs did bring an action for unlawful detainer against the party in possession, and recovered the possession and damages for the detention of the premises, etc.

The plaintiffs afterwards, notwithstanding this recovery, brought this suit on the covenant in the lease to deliver them the possession on the 1st of March, 1869. To this action the defendants set up the former suit and recovery as a defense in their answer. But the court, on motion, struck out this defense, and to this ruling of the court the defendants excepted. This defense being struck out, left nothing to try except the proper measure of damages. At the time the lease was executed the plaintiffs were non-residents of the State, residing in Indiana, and purchased farming utensils and removed their families with these utensils from their former residence to Johnson county, to enter into the possession of the leased premises, when they found it as above stated, in the possession of a former tenant. Although there is no covenant in the lease to indemnify them for the expenses of removal in case possession was not given according to the terms of the lease, yet they claimed such expenses by way of damages on the covenant to give possession, and also damages for loss on their farming utensils; and the court maintained that they must be allowed such expenses, etc., as part of the damages, and in addition thereto that the plaintiffs were entitled to recover whatever amount the premises might be *worth to them* over and above the rental value as fixed by the lease.

1. In my judgment these rulings of the court were erroneous. A party can recover only such damages as naturally result from a breach of the covenant sued on. He cannot recover remote or speculative damages not provided for by the contract. He can protect himself against such damages by requiring a provision to

that effect to be inserted in the contract. If he fails to do this he can only recover what naturally results from a violation of the contract. What connection with this covenant has the plaintiffs' place of residence? It so happens that they resided in Indiana and had to remove to Missouri. This did not result from the terms of the contract. It made no kind of difference where they resided, or how much it cost to remove their families to Missouri. If they had resided in Europe or Asia, or some other remote country, it might have cost them ten times as much to remove here as it did from Indiana. Such considerations are in nowise connected with the contract, and are too remote to be taken by the court or jury as a part of the measure of damages in a case like this.

I know that the courts have differed in regard to this subject of remote damages. Some of them have allowed such damages, while others have rejected them. We think the better rule is to exclude such damages from the consideration of the jury where they are not provided for by the terms of the contract.

The true rule of damages in this case was the difference between the rent as provided for in the lease and the rental value of the premises. (See Trull v. Granger and Dillaye, 4 Seld. 115.) If the rental value was more than the rent reserved, the plaintiffs would be entitled to recover such difference. The rental value is not what it might be worth to the plaintiffs, but what the premises would rent for in that neighborhood. They might be worth very little to the plaintiffs, or, owing to some fortuitous circumstances, they might value them higher than they were really worth.

2. I think the court also erred in ruling out the defense of former recovery and satisfaction set up in the answer. Although the lease was to commence *in futuro*, yet when such time arrived it operated as a present interest, and the lessees had the right to commence an action to recover the possession. They had two remedies: one on the covenant to give possession, and the other as legal owners for the term, by action to recover such possession.

In the case of Gardner v. Keteltas, 3 Hill, 332, it was held that where the premises were in possession of a wrong-doer the lessees had no remedy upon the covenants in the lease, but must resort to their action of ejectment or other action for the posses-

sion. But in Coe v. Clay, 5 Bingham, 440, the court declared that "he who lets, agrees to give possession, and not merely the chance of a law-suit;" and the lessees were entitled to recover on the breach of the covenant to give possession. I think this is the correct doctrine. It was followed in the case of Trull v. Granger, 4 Seld., N. Y., 115. The lessees were not compelled to resort to ejectment or other action for the possession; but as they selected this remedy and recovered possession and the rents and profits, they are thereby barred from maintaining this action. They recovered in the first suit not only the damages they seek to recover in this case, but the whole value of the rents and profits. The question might arise whether they could not be required to pay to the defendants the rents reserved by the lease during the time for which damages by way of rents and profits were allowed to them in the former action. But that question is not before us, and we express no opinion upon it.

Judgment reversed and cause remanded. The other judges concur.

THE STATE OF MISSOURI *ex rel.* JAMES H. VAIL, Relator, *v.* DANIEL M. DRAPER, STATE AUDITOR, Respondent.

1. *Courts, judicial — Abolition, etc. — Semble,* that the abolition or alteration of a judicial circuit will not abolish the office of the circuit judge.
2. *Courts — New circuits, acts creating — Judge — Commission — Salary —* Mandamus. — When the number used in designating a judicial circuit is also used in the commission issued to the judge, although the boundaries of his circuit are not designated, he is thereby constituted the judge of the territory which elected him. And the passage of an act of the Legislature constituting the same territory a new circuit denominated by a different number, and the appointment of another judge to preside over the circuit so designated, will not have the effect of vacating his office or invalidating his commission. And the judge originally commissioned will be entitled to *mandamus* against the State auditor in case of his refusal to issue a warrant for the proper salary, notwithstanding such legislation and appointment.

Petition for Mandamus.

Ira E. Leonard, for relator, cited Const. of Mo., art. VI, §§ 14, 16–19; Commonwealth v. Gamble, 62 Penn. 343; Commonwealth v. Mann, 5 Watts & Serg., Penn., 403; People v.

Dubois, 23 Ill. 547; People *ex rel.* Ballou v. Bangs, 24 Ill. 187; People v. Garey, 6 Cow. 642; 9 Cow. 640; State v. Messmore, 14 Wis. 163; Lowe v. Commonwealth, 3 Metc., Ky., 237; Commonwealth v. Sutherland, 3 Serg. & R. 145; Hoke v. Henderson, 4 Devereux, N. C., 1; Page v. Hardin, 8 B. Monr. 648; McCafferty v. Guyer, 9 P. F. Smith, 109; Bates v. Kimball, 1 Chip. 77; People v. Draper, 15 N. Y. 558; Moses Mand. 87; Citizens' Bank v. Wright, 6 Ohio St. 318; The People v. Pinckney *et al.*, 32 N. Y. 377; The State v. Dilloway, 2 Vroom, N. J., 42; State *ex rel.* Vail v. Draper, 48 Mo. 213; Barto v. Himrod, 4 Seld. 483; State *ex rel.* Circuit Att'y v. Cape Girardeau State Line R.R., 48 Mo. 468; 38 Mo. 419; State *ex rel.* Attorney-General v. Davis, 44 Mo. 129; State *ex rel.* Jackson v. Emerson, 39 Mo. 87; State of Ohio *ex rel.* Flinn v. Wright, 7 Ohio St. 333.

Lay & Belch, for respondent.

The general assembly may change, modify or abolish a statutory office, and the incumbent would hold subject to such change, modification or abolishment. (State *ex rel.* Davis v. Mann, 41 Mo. 395; State *ex rel.* Attorney-General v. Davis, 44 Mo. 129; Primm v. City of Carondelet, 23 Mo. 22.) And while it may be admitted that the office of circuit judge cannot be abolished nor the term changed, yet the circuits are prescribed or given by statute, and they may be changed, modified or altered by the statute. (6 Wend. 531; 18 Me. 109; 7 Ohio, 333; 62 Penn. St. 348; People *ex rel.* Ballou v. Bangs, 24 Ill. 184.)

ADAMS, Judge, delivered the opinion of the court.

This is a petition for *mandamus* upon the State auditor to compel him to issue to the relator a warrant for a quarter's salary alleged to be due the relator as judge of the Twenty-sixth, formerly Fifteenth, judicial circuit of this State. The facts of the case, as they appear from the record, are as follows: Under the law as it existed up to the 15th of March, 1872, the Fifteenth judicial circuit was composed of the counties of Iron, Reynolds, Washington and Jefferson. At the general election for judges, held in November, 1868, the relator was elected judge, and com-

missioned as such judge, of the Fifteenth judicial circuit by the governor. He qualified as such judge under the constitution and laws of this State, and entered upon his duties as such, and has continued in possession of the office, discharging its duties, until the present time. It further appears from the record that at the adjourned session of the Twenty-sixth general assembly an act was passed and approved the 15th of March, 1872, entitled "An act dividing the State into judicial circuits, prescribing the time of holding courts therein, and providing for the election of five additional circuit court judges and circuit attorneys." The twenty-seventh section of the act provides that the Twenty-sixth judicial circuit shall consist of the counties of Jefferson, Washington, Iron and Reynolds. These counties are the identical counties, and embrace the same territory, which constituted the former Fifteenth judicial circuit. Under section 16 of this act the counties of McDonald, Jasper, Newton and Lawrence, in the extreme southwest part of the State, are made to constitute the Fifteenth judicial circuit. The auditor, as a justification of his refusal to issue the warrant, sets up the fact that under this act Philip Pipkin was commissioned as judge of the Twenty-sixth judicial circuit, as created by this act, on the 24th of April, 1872, as appears by the register of civil officers of government in the office of Secretary of State.

It will be seen from this statement that the question arising upon this record is whether the relator by this act was ousted from his office, or, if not ousted, whether he is not now the judge of the new Fifteenth circuit instead of the present Twenty-sixth circuit.

I suppose it will not be seriously contended that the Legislature has the power to expel a circuit judge from his office by a simple act of legislation. This office is created by the constitution, and as long as there is a circuit over which the judge may preside he is entitled to hold his office until the expiration of his term, if he behaves himself properly. Whether the Legislature, by abolishing his circuit, can also abolish his office, is a question not necessarily presented by this record. The weight of authority, however, seems to be that the abolition or alteration of the circuit does not abolish the office. The independence of the judiciary

demands that this should be the case. (See Commonwealth v. Gamble, 62 Penn. 343; Commonwealth v. Mann, 5 Watts & Serg. 403; People v. Dubois, 23 Ill. 547; People *ex rel.* Ballou v. Bangs, 24 Ill. 187; People v. Garey, 6 Cow. 642; 9 Cow. 640; State v. Messmore, 14 Wis. 163; Lowe v. Commonwealth, 3 Metc., Ky., 237; Hoke v. Henderson, 4 Devereux, N. C., 1; Page v. Hardin, 8 B. Monr. 648.) But the act of the Legislature under consideration does not abolish the relator's office, nor does it change or modify his circuit. It leaves it precisely as it was before, except that the number by which it was designated is changed from Fifteenth to Twenty-sixth. The fourteenth section of the sixth article of the constitution provides that "the State shall be divided into convenient circuits, of which the county of St. Louis shall constitute one, for each of which, except as in the next succeeding section specified, a judge shall be elected by the qualified voters of the respective circuits," etc. It is also provided by the same section that "no judicial circuit shall be altered or changed at any session of the general assembly next preceding the general election for judges." The next succeeding section has relation to the organization of the court and election, etc., of judges for the Circuit Court of St. Louis county.

Convenient circuits mean territorial districts, and not the names by which such districts may be called. The numbering of the districts or circuits is only a convenient mode of designating them. They might have been designated by giving them the names of distinguished persons or places, or in any other mode, so as to distinguish them apart from each other. The name or number of the circuit constitutes no essential part of it. The entity is the territory embraced within certain boundaries, and that remains the same whether the name or number be changed or not. But when the number used in designating the circuit is also used in the commission issued to the judge, without inserting the boundaries of his circuit, he is thereby constituted judge of the territory which elected him. The simple change of the number designating his territory will not invalidate his commission as judge of that territory. He remains judge of the same territory notwithstanding the name or number of that territory is changed. It is urged,

however, that the simple change of number changes also his territory, and that he must remove to the number indicated by his commission, although it may cover territory two hundred miles distant. If this be true, then the next Legislature may change the number again and drive him to another part of the State. and every succeeding Legislature might do likewise. The constitution admits of no such construction.

The St. Louis circuit is designated in the commission of the St. Louis judges as the Eighth circuit, and the act of the Legislature designates the St. Louis circuit as the eighth in number. Now suppose the Legislature in a new act was to call it the tenth, and number the existing tenth as the eighth. Would the five judges in St. Louis have to emigrate to find their circuit, or could they still remain as the judges of that particular territory notwithstanding its number had been changed to the tenth? The absurdity of this carries its refutation on its very face, and yet there is no difference in numbering this circuit and numbering any of the others. The number in either case is only used as a convenient mode of distinguishing one from another.

Under this view the relator is entitled to his warrant. The return of the defendant is adjudged insufficient, and a peremptory *mandamus* granted. The other judges concur.

THE STATE OF MISSOURI, Respondent, *v.* THOMAS H. KEENE, Appellant.

1. *Practice, criminal — Threats by deceased, the day prior to homicide.* — In an indictment for murder, evidence of threats made by the deceased the day prior to the homicide, and continuing uninterruptedly down to the time of the death, declaring his intention to kill the accused, is competent as a part of the *res gestæ*, and should not be excluded from the jury.
2. *Homicide — Character of deceased as desperate, etc., may be shown, when.* — Where a homicide occurs under such circumstances that it is doubtful whether the act was committed maliciously or from a well-grounded apprehension of danger, testimony showing that deceased was turbulent, violent and desperate, is proper, in order to determine whether the accused had reasonable cause to apprehend great personal injury to himself.

Appeal from Boone Circuit Court.

O. Guitar, for appellant.

I. The court erred in excluding the evidence of the threats. (State v. Sloan, 47 Mo. 604.)

II. The court erred in excluding the evidence of the witness, A. G. Burton, to the fact that the deceased was in the habit of carrying deadly weapons, and the further fact that he was a quarrelsome, dangerous and desperate man. (Monroe v. The State, 5 Ga. 85; The State v. Hicks, 27 Mo. 588.)

A. J. Baker, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted for killing one Evans, and on the trial the jury found him guilty of murder in the second degree, and assessed his punishment at sixteen years in the penitentiary.

It seems that the defendant had been on terms of amity and good-will with Evans till the day before the killing took place. On that day they met at the house of a friend, together with other company, when the defendant treated Evans with friendship and civility. But Evans had ascertained that the defendant was engaged to be married to a niece of his wife, and was greatly enraged about it, and, instead of returning the kind treatment of the defendant, he violently assaulted him with a pistol and knife, and swore that he would kill him, and that nothing but his blood would satisfy him. Through the intercession of friends he was kept from carrying out his purpose or hurting the defendant; but the defendant, in order to save himself from violence and death, was obliged to hide in another room, and finally make his escape from a back door. After this occurrence Evans renewed his threats; declared that he would make no compromise in reference to the matter; that he would kill defendant on sight, if it was the last act of his life. These threats were communicated to defendant the same evening.

It further appears that on the morning after the occurrence above referred to, and some two hours prior to the killing, the

defendant, in company with another person, went out to hunt prairie chickens, and when they had reached a point near the railroad depot, and just after the defendant had discharged his gun at some chickens, Evans came out of the depot and halloed to the defendant, saying to him that he was "a d—d cowardly son of a b—h," and that if he would come up there he would "thrash h—ll out of him," and that he intended to kill him if he married his niece. The only answer defendant made to this abuse was to ask Evans what he wanted to kill him for; at the same time he told his companion that that would break up their hunt, and they immediately started home. On his arrival at home defendant went to his stable to put up his horse, and while he was still at his stable Evans, in company with two other persons, rode up. Evans went into a store across the street from the stable. Defendant wanted to go into the store and warm, for it was cold weather, but he was warned not to do so, as he would be in danger of his life if he met Evans. Defendant then stayed in the stable and sent friends to have an interview with Evans, for the purpose of trying to arrange the difficulty. He was willing to agree to almost anything, accept the most humiliating terms, and only desired that his life might be saved. But Evans was obdurate; he would abate nothing of his hatred and his desire for blood, and the life of defendant only would satisfy him. Evans then came out on the street, and was in fierce altercation with the persons around him, when the defendant fired the shot from which he afterwards died. The defendant immediately gave himself up, declared that he fired the shot, and that he did it to save his own life.

At the trial the court excluded all evidence of what occurred on the day previous to the killing, and the threats made by the deceased in reference to his intention to kill the defendant. In this the court unquestionably erred. This whole transaction, and all the matters connected with the difficulty, are so nearly allied that it is impossible to separate them. From the inception to the fatal consummation less than twenty-four hours intervened. The threats continued down uninterruptedly, and were all nearly coeval with the killing, and they were all brought home to the knowledge of the party who did the slaying. They constituted the chain of

one continued hostile series of acts by the deceased down to the time that he was shot. That they had created a dread in the breast of the defendant, and that he was in danger of losing his life, there can be no doubt, and the evidence was admissible to show the reasonableness of his fears. (The State v. Sloan, 47 Mo. 604.)

The court also erred in refusing the evidence offered by the defendant to show that the deceased was a violent, dangerous and desperate man. The character of the deceased would afford no justification, or even palliation, if it should be found that the defendant was the aggressor. Where a person commits a homicide without a reasonable cause to apprehend immediate danger of violence to himself, he cannot interpose the defense that the person whom he slayed was a dangerous and vicious man. All people alike are under the protection of the law. "But the imminence of danger that will justify us in acting upon the instinct of our nature, in repelling a blow before it is received, often depends upon the character of the assailant. The menacing attitude of a person generally peaceable and law-abiding would often excite no just apprehension of danger, while similar conduct on the part of a fierce, vindictive and passionate man would naturally alarm our fears, and make us prompt in anticipating his purposes. When danger is threatened and impending, we are not compelled to stand with our arms folded until it is too late to strike, but the law permits us to act on reasonable fear; and therefore when the killing has been under circumstances that create a doubt as to whether the act was committed in malice or from a sense of real danger, the jury have the right to consider any testimony that will explain the motive that prompted the accused." (The State v. Hicks, 27 Mo. 588.)

When the homicide is committed under such circumstances that it is doubtful whether the act was committed maliciously, or from a well-grounded apprehension of danger, it is very proper that the jury should consider the fact that the deceased was turbulent, violent and desperate, in determining whether the accused had reasonable cause to apprehend great personal injury to himself. If such evidence is ever legitimate, the facts in this case show that it was one calling for its introduction.

It is further insisted that the court erred in refusing to grant a new trial on the ground of newly-discovered evidence. The point is, I think, well taken; but as the case will go back for other reasons, it is wholly unnecessary to examine the question, as the evidence is now attainable and can be used on a new trial.

For the errors hereinbefore alluded to, the judgment must be reversed and the cause remanded. The other judges concur.

THE STATE OF MISSOURI *ex rel.* AND TO THE USE OF GEORGE W. KOONTZ AND ALFRED M. KOONTZ, Defendants in Error, *v.* M. H. LUCE *et al.*, Plaintiffs in Error.

1. *Bond, suit on — Verdict — Judgment — Appeal, etc.* — In a suit upon an official bond, the error of the trial court in rendering judgment upon the verdict of the jury, instead of on the bond, with a further judgment that relator have execution for the damages assessed, is a merely formal one, which may be corrected at any time, and will not authorize a reversal of the cause.

Error to Moniteau Circuit Court.

Moore & Williams, for plaintiffs in error.

Owens & Wood, for defendants in error.

ADAMS, Judge, delivered the opinion of the court.

This was an action on the official bond of Luce as constable, and the other defendants as his sureties, for taking and seizing and injuring certain property of relators under color of his office as constable.

The defendants justify under an order of the County Court levying a tax of five dollars on public shows, and set up that the property in question was levied upon for a tax of that character.

The facts of the case tended to show that the relators proposed to deliver a lecture in a church in the town of California, on the life and character of Jesus Christ, and in illustration of his character, and in aid of the lecture, to exhibit a large panorama painting illustrating various scenes in the life of Christ. The lecturer charged an admittance fee, and had commenced receiving money

as admittance fees before commencing the lecture, when the constable appeared and applied for the tax. The lecturer told him it was not a show, and if he, the constable, insisted it was a show, he would return the audience the money he had received before opening the lecture, and lecture free of charge, and offered to do so; but the constable insisted on making a levy, and refused to levy on a wagon and team which were offered him, but seized the painting, and kept it till he made a sale of it, and, as is alleged, injured it considerably. When it was offered for sale it was bought for the relators at the price of ten dollars. But they claim that it was injured very much by the constable. The evidence also tended to show that the constable, in making the levy, acted with violence and used profane language.

After the close of the evidence the court gave instructions on both sides, presenting the views of each party as to what constitutes a show. The instructions taken together seem to have presented the case fairly to the jury. The jury found a verdict for the relators.

The defendants have objected here that the judgment was rendered upon the verdict and not on the official bond, with a further judgment that the relators have execution for the damages assessed. This objection was not made in the court below and the matter was a mere formal one, which that court, on motion, may at any time correct. It is not an error for which we ought to reverse the judgment.

Upon the whole record, it appears that the judgment is for the right party. Judgment affirmed. The other judges concur.

THE STATE OF MISSOURI, Appellant, *v.* C. HEIN *et al.*, Respondents.

Practice, criminal — Indictment — Officer — Scienter, etc. — An indictment against an officer, under the statute (Wagn. Stat. 487, § 16), should charge that the acts complained of were done not only willfully, but knowingly and corruptly.

Appeal from Cooper Circuit Court.

J. W. Moore, Circuit Attorney, for appellant.

The ordering of money to be paid to or warrants issued by County Court justices, in favor of any party, either for real or pretended services or as a gratuity, is simply a ministerial or administrative act and not a judicial act; and a willful and gross abuse of authority by a ministerial officer differs from a corrupt decision of a judicial officer, and the language of an indictment against the former does not require the same technical words. (State *ex rel.* Conner v. Cooper County, 17 Mo. 507; Phelps County v. Bishop, 46 Mo. 68.) There could be no malicious partiality or misconduct.

As the misdemeanor charged does not apply to a judicial act, the case of The State v. Gardner is not applicable, and it is not necessary or proper to charge the act to have been done corruptly. (2 Mo. 23.)

Draffin & Muir, for respondents, cited The State v. Gardner, 2 Mo. 23.

WAGNER, Judge, delivered the opinion of the court.

This was an indictment against the justices of the Cooper County Court, and charges "that said parties, being then and there justices of the County Court of said county, duly elected, etc., did then and there, under color of their offices as such justices, unlawfully, willfully and by a gross abuse of authority in their official capacity, and under color of their said offices as justices of the said Cooper County Court, draw and order to be drawn on the treasurer of said county a warrant," etc. The indictment was demurred to as insufficient, and the demurrer was sustained and the State appealed to this court.

The section of law under which this indictment was framed declares that "every person exercising or holding any office or public trust who shall be guilty of willful and malicious oppression, partiality, misconduct or abuse of authority in his official capacity, or under color of his office, shall, on conviction, be punished," etc. (Wagn. Stat. 487, § 16.)

The act of which the officers must be guilty must be a willful act, but the indictment to be good should contain other averments. It should show such acts as would amount to the imputed crime independent of the word "willful"; and to make this out, the indictment should charge the act to have been done knowingly and corruptly, and the act should be alleged to be willful. (The State v. Gardner, 2 Mo. 23.)

I think the demurrer was properly sustained, and the judgment of the Circuit Court should be affirmed. Judge Bliss concurs. Judge Adams not sitting.

RICHARD H. PORTER, Respondent, *v.* E. J. MARINER, Appellant.

1. *Sheriff — Constitution — Retroactive laws — Vested rights.* — The act of March 23, 1863 (Sess. Acts 1863, p. 20), authorizing the issue of an execution of *venditioni exponas* upon a levy theretofore duly made, with a clause for further levy after exhausting the property levied on, is not retroactive, nor does it divest any vested right, but it is simply in the nature of a remedy to enforce an existing right.
2. *Sheriff — Levy — Deed by successor of the term of office.* — Under the act of 1855, touching executions (R. C. 1855, p. 750, § 6; Wagn. Stat. 613, § 61), a sheriff may, after expiration of his term of office, make a deed to land levied on by his predecessor. And he may do so without any order of court.
3. *Execution — Levy, date of prior to that of execution, etc.* — The dating of a levy made under an execution, before the date of the issue of the execution, will not vitiate it.
4. *Sheriff, deed by — Relates back, etc.* — A sheriff's deed relates back to the time of the sale, as to the defendant in the execution and his privies, and as to strangers purchasing with notice, and vests the title in the execution purchaser from that time.

Appeal from Jackson Circuit Court.

A. Comingo, for appellant.

The fact that the sheriff had not made the levy, in no manner abridged his power to execute a deed after the expiration of his term of office. (See Hunter v. Miller *et al.*, 36 Mo. 147; Duncan v. Matney, 29 Mo. 375.)

H. B. Johnson and *Jas. S. Botsford*, for appellant.

I. Hayden was the proper officer to make the deed. (Duncan v. Matney, 29 Mo. 335; Hunter v. Miller, 36 Mo. 147.)

II. The deed, when made, took effect by relation from the date of the sale. (Alexander & Betts v. Merry, 9 Mo. 514; Crowley v. Wallace, 12 Mo. 143; Thornton v. Miskimmon, 48 Mo. 219; Jackson v. Ramsay, 3 Cow. 75; Colyer v. Higgins, 1 Duvall, 7.)

III. The act of the Legislature, extending the lien of the judgments, was not unconstitutional. It only affected the remedy, but not any vested right.

IV. The executions were in force and valid at the time of levy; at least they are valid until the sale is attacked by a direct proceeding. (Groner v. Smith, 49 Mo. 318.)

Gage & Ladd and *Woodson & Sheley*, for respondent.

All and both of the renewal executions are null and void, and the deed was therefore void and properly excluded. (Turner *et al.* v. Keller *et al.*, 38 Mo. 332.)

The case of Wood v. Messerly, 46 Mo. 255, puts the validity of the act of 1863, with reference to that execution, upon the ground of "the act of 1863 going into effect a few days before the expiration of the execution." The case of Lackey v. Lubke, 36 Mo. 115, decided that prior to the act of 1863 an execution and levy became *functus officio* after the second term from the return.

The only case in which an ex-sheriff is authorized to execute a deed for property sold by him as sheriff, is where he has also levied upon the property. (R. C. 1855, p. 749, ch. 63, § 62.)

ADAMS, Judge, delivered the opinion of the court.

This is an action of ejectment. The defendant claimed title from plaintiff under a sheriff's deed. The court excluded this deed and rendered judgment for plaintiff. The deed purports to have been executed by John G. Hayden, late sheriff of Jackson county, September 22, 1869, and recites:

1. A judgment of the Jackson Circuit Court, rendered on the 15th day of March, 1858, in favor of Smart and Chrisman, admin-

istrators of Smith, against plaintiff Porter; and under that judgment execution issued January 16, 1861, to the sheriff of Jackson county, returnable to the March term, 1861, and on the 29th day of February levied on the premises sued for; that Burrus, the then sheriff, advertised the property for sale, and did not sell for the reason that no court was held for civil business; that on the 16th of February, 1865, another and new execution was issued by the clerk upon said judgment, directed to the sheriff of said county and returnable to the March term, 1865, in which last execution said former execution and the levy thereof were recited, and also that said real estate was not sold, in consequence of no court having been held at the first and second terms after said levy and the return of said execution, and by which said last execution the sheriff is commanded to cause to be made the debt and costs of said judgment out of the property levied on under said first execution until exhausted, and then of other goods and chattels, etc.

2. A judgment of the same court in favor of George W. Buchanan, administrator, against plaintiff and others, rendered at the March term, 1860, on the 22d day of March; execution, levy, advertisement, failure to sell, return, and new execution of same date and in same form as under the first judgment, except that the execution is recited to have issued the 30th of January, 1861, and to have been levied on the —— day of ——, 1861.

3. A sale under said renewed executions, March term, 1865, to one Peacock, from whom defendant shows title.

The defendant read in evidence the judgments and the several executions and returns thereon, referred to in the sheriff's deed. The execution in favor of Buchanan is dated January 30, 1861, and the return says it was levied January 29, 1861. The levies were on both real and personal property belonging to the plaintiff Porter, and one of the executions was also levied on some personal property belonging to Phelps, one of the defendants in the execution, for which he gave a delivery bond and forfeited it.

1. The first point I will notice is Hayden's authority to make this deed. Burrus, who was the sheriff when the first executions were issued, made the levy and returned the executions, without any sale of the property levied on, and died. Then the new

executions, which in fact were in the nature of executions of *venditioni exponas*, with a clause for further levy after exhausting the property levied on, were issued in 1865 to Hayden, the then sheriff, under the act of the Legislature of March 23, 1863. The first section of this act expressly authorized this kind of execution to be issued on levies which had been made at the time of the passage of the act. A *venditioni exponas* might have been issued on this levy without regard to the statute. But the statute not only authorizes a *venditioni*, but an additional clause for a new levy in case the old levy was not sufficient. This part of the statute is not retroactive. It does not divest any vested right, but is a remedy to enforce an existing right. I can see no force in the objection that it is unconstitutional. I know of no provision of the constitution that is violated by permitting a plaintiff in a judgment to enforce it by new remedies. (See Bolton v. Landsdown, 21 Mo. 399.) There is no question but that Hayden, who made the sale, could also have made the deed when he made the sale. But his term of office expired before he made the deed, and it is contended that no sheriff except the one who made the levy can make a deed after the expiration of his term of office. That seems to be the strict letter of section 62 of chapter 63, R. C. 1855, p. 749. The officer who made the levy died, and if he had not died there would have been no doubt that he could have gone on and made the sale, and after the expiration of his term he could have made the deed under section 62. But section 63 provides for the case under review. Under that section, when an officer dies after having made a levy and before a sale, "the sheriff or coroner then in office shall proceed therein and do and perform all things remaining to be done and performed in relation to such execution, and the sale of such property and the making and executing deeds and conveyances therefor, in the same manner and with like effect as the officer so deceased, removed from office or disqualified would have done." (R.C. 1855, p. 750.)

If the deceased officer, in case he had lived, could have made a deed after his term had expired, so can the officer who makes the sale of the property levied on. And in fact he is the only party

to make the deed, and can do so without any order of the court. If he should die or remove from the State, or be removed from office or otherwise disqualified, an application must be made for an order on the sheriff then in office to make the deed, under section 64, R. C. 1855, p. 750. As none of these contingencies had occurred, Hayden, as late sheriff, was the proper person to make the deed.

The levy of one of the executions being dated the day before its issue, is an evident clerical mistake and does not vitiate it.

2. The point made, that the executions were satisfied, is not borne out by the facts. The levies were made at the same time on real and personal property. But the real estate alone was sold, and the presumption is that the personal property went back to Porter. The personal property belonging to Phelps was kept by him on bond, which he forfeited. The statute expressly declares that in such case the execution may be levied on other property.

3. A sheriff's deed relates back to the sale, as to the defendant in the execution and his privies, and as to strangers purchasing with notice, and vests the title in the execution purchaser from that time. (See Strain v. Murphy, 49 Mo. 337; Groner v. Smith, 49 Mo. 318.) It is no objection, therefore, that the deed was made after the commencement of this suit.

Judgment reversed and the cause remanded. The other judges concur.

E. T. RENSHAW, Appellant, *v.* WILLIAM L. LLOYD *et al.*, Respondents.

1. *Trespass — Ownership, actual — Averment of unnecessary.* — In an action for trespass, it is unnecessary for plaintiff to allege that he was at the time in actual possession of the property trespassed upon. But the averment of his ownership is sufficient. Where one has the legal estate in fee in lands, he has the constructive possession unless there is an actual possession in some one else.

Appeal from Moniteau Circuit Court.

Owens & Wood, for appellant, cited Wynn v. Cory, 43 Mo. 301; Hewitt v. Harvey, 46 Mo. 368.

Burke & White, for respondents

If this was a trespass suit, whether under the statute or at common law, the petition should have shown actual possession to let in the proof offered. (1 Chit. Pl. 162, 180; 2 Greenl., § 613; Sedgw. Dam. 134, 139, 147–8, 154–5.)

ADAMS, Judge, delivered the opinion of the court.

This was an action for trespass on lands. The petition alleges that "on the 18th of November, 1870, at the county of Moniteau, in the State of Missouri, the defendants, without leave and wrongfully, entered on the northeast quarter of the northeast quarter of section 18, township 45, range 16, of which the plaintiff was then the owner, and then and there tore down the fences of plaintiff and scattered his rails, and left his fields open and exposed, by which acts and doings of the defendants the plaintiff was damaged in the sum of one hundred dollars, for which he asks judgment." The defendants, by answer, denied all the allegations of the petition.

On the trial the plaintiff offered to prove his case as laid in the petition, but the court refused to permit any evidence to be given because the plaintiff had not alleged in his petition that he was in the possession of the premises described in the petition. The plaintiff took a nonsuit, with leave to move to set it aside, and did file a motion to set aside the nonsuit, which was overruled by the court, and he excepted to this opinion and has brought the case here by appeal.

In this State the owner of lands is presumed to be in the possession till the contrary appears. It has never been held here that there must be an actual possession to maintain trespass. When a party has the legal estate in fee in lands, he has the constructive possession when there is no actual possession in any one else.

The word "owner," as used in this petition, means that the plaintiff has the legal estate in the lands and is in the possession.

The court erred in rejecting the proof offered by plaintiff, and for this error the judgment must be reversed and the cause remanded. The other judges concur.

E. T. RENSHAW, Appellant, *v.* F. MCVEAN, Respondent.

1. Renshaw v. Lloyd, *ante*, p. 368, affirmed.

Appeal from Moniteau Circuit Court.

Owens & Wood, for appellant.

Burke & White, for respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action for trespass on the plaintiff's lands. The pleadings and facts and rulings of the court below are the same in this case as in the case of Renshaw v. Lloyd *et al.*, *ante*, p. 368, and the judgment must be the same.

Judgment reversed and the cause remanded. The other judges concur.

THE STATE OF MISSOURI, Respondent, *v.* JOHN SIMON, Appellant.

1. *Criminal law — Indictment — Venue.* —The statement of venue in the margin of an indictment is a sufficient allegation of venue for all the facts stated in the body of the indictment.
2. *Criminal law — Confessions, when competent—Duress.*— The mere fact that a criminal was in charge of an officer at the time is not sufficient to render his confession inadmissible in evidence. But it must further appear that it was induced by the flattery of hope or the torture of fear, or intimidation.
3. *Criminal law — Dying declarations, when admissible — Fear of death.*— In order to render a dying declaration admissible, it should clearly appear that the statements offered in evidence were made under well-founded apprehension of immediate or impending dissolution.
4. *Criminal law — Evidence — Dying declaration — Truth of, to be determined by the court.*— The truth of the evidence introduced to show that the declarations were made in view of speedy death, is a matter exclusively for the court to determine.

Appeal from Lawrence Circuit Court.

From the statement furnished on behalf of appellant, it appears that Goetz said to witness Tobien, "Dear friend, I have to die. I received two mortal wounds, and they pain me a great deal,"

and other words of similar import. The witness further testified that Goetz said to him, "In case I should die, I have a sister in Germany who has three children; I have three hundred dollars, and I want her to have it." The court then asked him what he said, and he replied, "When I die," etc.

N. Bray and *N. H. Dale*, for appellant.

I. The statement that the wounds were mortal is a matter of opinion, which cannot be given in evidence as dying declarations under any circumstances. (See 1 Phil. Ev., 4th Am. ed., 297; 1 Greenl. Ev., § 159.)

II. The court erred in admitting the testimony of DeGroff as to the conversation had with defendant. (1 Phil. Ev. 544, and cases cited; Roscoe's Crim. Ev., 6th Am. ed., 39.)

III. In order that the statements of the deceased may be admitted as dying declarations, it is necessary to be shown that they were made under the personal apprehension of impending death. (1 Phil. Ev., 4th Am. ed., 289, note; 1 Greenl. Ev., 11th ed., § 158; Roscoe's Crim. Ev. 31; Starkey v. The People, 17 Ill. 17.) And it is further necessary to be shown that the declarant had a deep impression of his accountability to his Maker, and that he was soon to appear before his Maker to give an account to him as his judge. And we think this is not to be presumed, but must appear affirmatively. (See 1 Phil. Ev. 288; 1 Greenl. Ev., § 157.

A. J. Baker, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The defendant was convicted in the court below of murder in the first degree, for killing one Anton Goetz. Many objections have been urged against the verdict and the ruling of the court on the trial, but the only question which the record makes it necessary or material to notice is the action of the Circuit Court relating to the admission and exclusion of testimony. There is no force in the objection that error was committed in admitting testimony as to the place of Goetz's death because no venue was laid in the indictment. The county was stated in the margin of

the indictment, and that was a sufficient allegation of venue for all the facts stated in the body of the indictment. But had there been a defect in stating the venue, the indictment would not have been invalidated. (Wagn. Stat. 1090, §§ 26, 27.)

Again, it is complained of as error that the sheriff was permitted to testify concerning a confession which the prisoner made to him while in his custody. This testimony was afterwards stricken out on motion of defendant's counsel, but it is said that the jury was absent when the court ruled out the evidence as illegal, and that the exclusion was never brought to their notice. The record, however, does not show this fact, and the presumption is that the jury were present in court and were cognizant of the proceeding. But I am not of the opinion that the evidence was inadmissible. The admissibility of a confession depends upon its being free from the suspicion that it was obtained by threats of severity or promises of favor, and every influence whatever. A learned writer on the law of evidence, in stating the doctrine, says: "A promise of benefit or favor, or threat of intimidation or disfavor, connected with the subject of the charge, held out by a person having authority in the matter, will be sufficient to exclude a confession made in consequence of such inducement, either of hope or fear." (1 Phil. Ev. 544.) But all the authorities agree that to warrant the exclusion of the confession, it must have been induced by the flattery of hope or the torture of fear, or intimidation. (Hawkins v. The State, 7 Mo. 190; The State v. Brockman, 46 Mo. 566.)

The sheriff testified that while the prisoner was in his possession he remarked to him that he ought to have had more control over his passions, and perhaps he would not have been in the place where he was; and the defendant said that they had been trying to run over him for a month, and he had come to the conclusion not to stand it any longer. This remark was purely voluntary. No inducement was held out, of advantage or favor, nor was there any threat or intimidation to lead to fear of punishment.

The next and most important question in the whole case is as to whether the court erred in admitting certain dying declarations of Goetz. The declarations were made on the night before death

took place, and were made to the witness Tobien, who says that when he called on him he found him suffering from his wounds, and he remarked, "I have to die. I received two mortal wounds, and they pain me a great deal. In case I should die, I have a sister in Germany who has three children; I have three hundred dollars, and I want her to have it." In answer to an interrogatory from the court, the witness varied the language and said that the deceased remarked, "When I die, I have a sister in Germany," etc.

The rule in reference to receiving dying declarations in evidence is well defined, founded upon a clear reason and supported by uniform authority. From necessity these statements, made by one speaking not under the obligations of an oath, but in the very presence of death, are received in evidence. The principle, as stated by Lord Chief Baron Eyre, on which this species of evidence is admitted, is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath in a court of justice. (Woodcock's case, 2 Leach, 3d ed., 563.)

In the last edition of Greenleaf on Evidence, Judge Redfield appends this note to the text: This evidence "is not received upon any other ground than that of necessity, in order to prevent murder going unpunished. What is said in the books about the situation of the declarant, he being virtually under the most solemn sanction to speak the truth, is far from presenting the true ground of the admission; for if that were all that is requisite to render the declarations evidence, the apprehension of death should have the same effect, since it would place the declarant under the same restraint as if the apprehension were founded in fact. But both must concur, both the fact and the apprehension of being *in extremis*. This presumption, and the consequent probability of the crime going unpunished, is unquestionably the chief ground of this exception in the law of evidence," and accordingly they

are received "only where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the declarations." (The King v. Mead, 2 B. & C. 605; 1 Phil. Ev., 4th Am. ed., 287; 1 Greenl. Ev. 181.)

In the last reported case on this subject in England, Byles, J., says: "Dying declarations ought to be admitted with scrupulous, and I had almost said with superstitious, care. They have not necessarily the sanction of an oath; they are made in the absence of the prisoner; the person making them is not subject to cross-examination, and is in no peril of prosecution for perjury. There is also great danger of omissions and of unintentional misrepresentations, both by the declarant and the witness, as this case shows. In order to make a dying declaration admissible, there must be an expectation of impending and almost immediate death, from the causes then operating. The authorities show that there must be *no hope whatever*. In this case the deceased said originally she had no hope at present. The clerk put down that she had no hope. She said, in effect, when the statement was read over to her, 'No! that is not what I said nor what I mean; I mean that at present I have no hope;' which is, or may be, as if she had said, 'If I do not get better I shall die.'" (Regina v. Jenkins, Law Rep., 1 C. C. R. 191.)

As there can be no cross-examination of the declarant, as the accused can rarely meet his accuser face to face, and as there must of necessity exist great danger of abuse, it should clearly appear that the statements offered in evidence have been made under a full realization that the solemn hour of death has come, and the court should be satisfied that the declaration was made under an impression of almost immediate dissolution. The court must decide upon the admissibility of the declarations; and the truth of the facts put in evidence, to show that declarations were made in view of speedy death, is a matter exclusively for the court to determine.

Now, does the evidence show a state of facts which would authorize the admission of the dying declarations? That the wounds were mortal was the mere opinion of the deceased, and there was no evidence to show that they were necessarily so. The

physicians were in attendance, but they had not communicated any such information to him. The expression "if I die" showed that hope still lingered in his bosom. The witness afterwards used the language "when I die" as the words of the deceased, but which of the two expressions were used is left in uncertainty. No further inquiries were made, and there seems to have been no effort to settle precisely what the deceased did say. Any person who has been accustomed to attend on those who are injured, or are very ill, knows how common it is for them to say that they will never recover, or that they will die, when there is no good or sufficient reason for the apprehension, and they are not conscious themselves that they are in any real danger. Such expressions are often the result of impatience, restlessness, or great suffering. But at the same time let the attending physician inform them that there is no hope, and that they must die, and they will be perfectly startled. I do not think that under all the circumstances Tobien's testimony made out a case authorizing the statements of the deceased to go to the jury as dying declarations. It does not sufficiently appear that he had given up all hope and was under a well-founded apprehension of impending or immediate dissolution.

The record discloses no other error necessary to be considered. It is useless to examine the instructions, as the case is not reversed on them, and the same state of facts may not be presented on a retrial.

Let the judgment be reversed and the cause remanded. The other judges concur.

JOHN H. SCHELL, Respondent, *v.* J. H. STEPHENS *et al.*, Appellants.

1. *Auctioneer — Implied warranty — Bill of sale — Presumption derived from signature.* — The mere fact that auctioneers at the time of sale were acting as such is not of itself notice that they were not selling their own goods, and they must be deemed vendors, and responsible as such for the title of the goods sold, unless they disclose at the time of the sale the name of the principal. And the joint signature of the bill of sale by the auctioneer with the principal, will raise a presumption that the auctioneer acted also as principal, which cannot be contradicted by parol evidence that he did not sell or intend to hold himself responsible as principal.

2. *Warranty, verbal — Statute of frauds.*— The verbal warranty of an auctioneer, where he himself alone was trusted and expressly agreed for himself to warrant the title, is an original undertaking and not within the statute of frauds, and it may therefore be shown in evidence.

Appeal from Kansas City Court of Common Pleas.

A. A. Tomlinson and *J. Hogle*, for appellants.

I. The court erred in holding that the instrument offered in evidence was a contract of sale. It was merely a receipt, and was susceptible of explanation by parol testimony. (1 Greenl. Ev., § 305; 1 Phil. Ev. 474–7; Weatherford v. Farrar, 18 Mo. 474.)

II. If plaintiff knew that defendants were acting in the character of auctioneers or agents in the sale of the property, then defendants can only be held liable for the debt, default or miscarriage of another by some memorandum in writing charging them with such liability, and signed by themselves or their lawfully authorized agents. (Wagn. Stat. 656, § 5.)

H. B. Johnson, for respondent.

I. When an agent enters into a contract in his own name, and does not disclose the name of his principal, he is personally liable. (McClellan v. Parker, 27 Mo. 162; Byars v. Doore's Adm'r, 20 Mo. 284; Lapsley v. McKinstry, 38 Mo. 245; Winsor v. Griggs, 5 Cush. 210; Stackpole v. Arnold, 11 Mass. 27; Mauri v. Heffernan, 13 Johns. 57; Sewall v. Fitch, 8 Cow. 215; Sto. Agency, §§ 266–7, 269, 276, 279, 288; Paley Agency, 372–3.)

II. An auctioneer is deemed personally a vendor to the purchaser at the sale, unless at the time of the sale he discloses the name of his principal, and the transaction is treated as being exclusively between the principal and the vendee. (Sto. Agency, §§ 27, 267; Mills v. Hunt, 20 Wend. 431; Jones v. Littledale, 6 Ad. & Ell. 486; Franklyn v. Lamond, 4 Com. B. 637; Hanson v. Roberdeau, Peake's N. P. 120.)

III. The mere fact that defendants were acting as auctioneers was not sufficient notice to plaintiff that they were not selling their own goods. (Mills v. Hunt, 20 Wend. 431; Jones v. Littledale, 1 Nev. & Perry, 677; Thompson v. McCullough, 31 Mo. 224.)

IV. Even where an agent discloses the name of his principal, if he signs a written contract in his own name, which does not upon its face show that it was done as the agent of another, he will be personally bound thereby. (Mills v. Hunt, 20 Wend. 431; Alford v. Eglisfield, Dyer, 230 *a;* Talbot v. Godbolt, Yelv. 137; 2 Liverm. Agency, ed. 1818, pp. 249, 251; Paley Agency, 278, 379; Smyth v. Spaulding, 13 Mo. 529; Mayhew v. Prince, 11 Mass. 54.)

V. When a person contracting as an agent and known to be an agent voluntarily incurs a personal responsibility, as, for instance, by guaranteeing the title to property sold by him as an auctioneer, he becomes personally liable. (Sto. Agency, §§ 269, 270; Simonds v. Heard, 23 Pick. 120; Tippets v. Walker, 4 Mass. 595; Appleton v. Binks, 5 East, 148; Stone v. Wood, 7 Cow. 453; Duvall v. Craig, 2 Wheat. 56; Mills v. Hunt, 20 Wend. 431; Kirkpatrick v. Stainer, 22 Wend. 244; Taintor v. Prendergast, 3 Hill, 72; Waring v. Mason, 18 Wend. 425; Collins v. Butts, 10 Wend. 399.)

VI. When an agent does not disclose his principal, or assumes a voluntary responsibility, he is personally liable as upon his own contract. The contract need not be in writing. It is not within the statute of frauds. (Sto. Agency, § 279; Browne on Frauds, §§ 155–213; Couturier v. Hastie, 16 Eng. L. & E. Rep. 562; Sherwood v. Stone, 14 N. Y. 267; Emerson v. Slater, 22 How. 28; DeWolf v. Rabaud *et al.*, 1 Pet. 476.)

VII. In case of unwritten contracts, the question is, to whom was the credit given? If given to the agent he is personally liable, though known to be acting as an agent. (Scrace v. Whittington, 2 Barn. & Cress. 11; Iveson v. Conington, 1 Barn. & Cress. 160; Cunningham v. Sales, 7 Wend. 106; Sto. Agency, § 279.) An agent, although known as such, by an express warranty of soundness or of title may make himself personally liable if credit is clearly given him on such warranty. (Paley Agency, 385–6; Sto. Agency, § 279; Fenn v. Harrison, 4 T. R. 177.)

Lay & Belch, for respondent.

I. Where a vendor, in possession of personal property, sells for full value, a warranty of title is implied. (Robinson v. Rice, 20 Mo. 229; Barton v. Faherty, 3 Green, Iowa, 327.)

II. It is well settled that unless an auctioneer discloses the name of his principal, he is bound as vendor himself. (McClellan *et al.* v. Parker, 27 Mo. 162; Thompson v. McCullough, 31 Mo. 224; Dent v. McGrath, 3 Bush, Ky., 174; Thomas v. Kerr, 3 Bush, 619; Mills v. Hunt, 20 Wend. 431; 1 Am. Lead. Cas. 135.)

III. Although the agent disclose the name of his principal, he may be personally liable. (Hovey v. Pitcher, 13 Mo. 191.) And even if he discloses the name of his principal he is personally liable, where he signs his own name to a written contract which does not upon its face show that he contracted as agent. (Mills v. Hunt, *supra.*)

IV. The receipt offered in evidence is an unconditional contract of sale. (Montany v. Rock, 10 Mo. 506.) It is signed by Stephens as principal, and does not show on its face that he contracted as agent.

Bliss, Judge, delivered the opinion of the court.

The defendants were auctioneers in Kansas City, and sold at auction a span of horses, wagon and harness, which were bid in by the plaintiff. The property turned out to have been stolen and was reclaimed. This suit was brought upon a warranty of title, the plaintiff claiming that defendants expressly warranted it to be good. The cause was submitted to the court upon conflicting testimony, and its finding must be sustained if founded upon correct declarations of law.

1. The second declaration is complained of, which was, in substance, that if defendants were in possession of the property and sold it for a valuable consideration, the law implies a warranty of title, although there was no express warranty. This would be correct if the defendants were the owners, or sold the property as owners; for the rule is that the seller of a chattel,

if in possession, who sells it as his own, warrants by implication that it is his own. (Pars. Cont., book 3, ch. 5.) But this can not be true in case of sale by auctioneers or other agents, if they sell as agents. Thus, a possession by a pawnbroker or auctioneer is not such a possession as implies title, but rather suggests title in others. (Pars. *supra*, and notes to 5th ed.) But though this declaration standing alone would indicate an erroneous view, yet another one, made at the instance of defendant, shows that the possession spoken of was understood to be possession as owner, and it was therefore correct.

2. The third declaration given at plaintiff's instance was, in substance, that if defendants did disclose to the plaintiff the name of their principal, but afterwards signed their own names to a written contract of sale which did not show that they acted as agents, the plaintiff should recover.

The contract or bill of sale referred to is as follows:

"KANSAS CITY, June 23, 1868.

"Received of J. W. Schell three ($300) hundred dollars for one bay and one gray horse and one two-horse wagon and harness. A. R. LEDFORD.

STEPHENS & SONS."

The mere fact that defendants were acting as auctioneers is not of itself notice that they were not selling their own goods, and they must be deemed to have been vendors, and responsible as such for title, unless they disclosed at the time the name of the principal. (Mills v. Hunt, 20 Wend. 431; Sto. Agency, §§ 27, 267.) This court, in Thompson v. McCullough, 31 Mo. 224, applied the principle to vendors of commercial paper. If the above receipt and bill of sale is to be treated as the contract between the parties, it is evident that the defendants undertook to sell the property as principals, and that the plaintiff purchased from them as well as Ledford, although the latter might have been the principal in fact; and parol evidence will not be admitted to contradict it and show that they did not sell as principals or intend to hold themselves responsible as such. It is said that the receipt may be explained. So it may, by showing that the $300 was not actually paid, or that more or less was paid, or even that there was no transaction of the kind. But when a sale by an agent is made, and the purchaser, who is deeply interested in the

title and is willing to trust the agent, while the principal is a stranger, takes written evidence of the sale, signed by the agents as principals, they must be held to have assumed the responsibility of principals; and none the less so because their business implies agency. Persons who hold themselves out as vendors of the property of others should see to the title of their principals. They have better opportunities of knowing it than purchasers ordinarily have, and though they may not be responsible for title if the property is purchased alone on the credit of the principal, yet it would be natural to rely upon the agent; and if he give a bill of sale in his own name, it must be presumed that the purchaser did so rely.

3. The plaintiff relied upon evidence of an express verbal warranty of title, and also upon the warranty implied by selling as principal, as evidenced by the above writing; and the defendant, treating it in either case as a collateral undertaking, asked for a declaration that such guaranty must be in writing because made to answer for the default of another person, and therefore contrary to the statute of frauds. But this would depend upon whether the promise was in fact to answer for another—*i. e.*, to guarantee the promise of another—or was an original undertaking. If the auctioneer alone was trusted, and he expressly agreed for himself to warrant the title, then the promise is not collateral, and is good though not in writing. A factor or commission merchant who verbally agrees to guarantee the sales is held for the default of the principal, notwithstanding the statute. (Wolf v. Koppel, 5 Hill, 458; Sherwood v. Stone, 14 N. Y. 267; Browne on Frauds, § 213.) The reason given in Sherwood v. Stone, why a different rule prevails in England, is because there the undertaking is understood to be collateral—*i. e.*, to pay if the debt cannot be collected of the purchaser—while in this country it is held to be an original undertaking.

I find no error in the record, and the judgment will be affirmed. The other judges concur.

HENRY J. LATSHAW *et al.*, Defendants in Error, *v.* MARGARET A. MCNEES *et al.*, Plaintiffs in Error.

1. *Practice, civil—Actions—Parties—Husband and wife—Mechanics' liens.*—An action under the mechanics' lien law is no exception to the law requiring that the husband shall be joined in all actions against the wife. (Wagn. Stat. 1001, § 8.)
2. *Practice, civil—Parties—Husband and wife.*—The statute of 1868 (Wagn. Stat. 1001, § 8), which provides that "when a married woman is a party her husband must be joined with her in all actions except those in which her husband is plaintiff only and the wife defendant only, or the wife plaintiff and the husband defendant," is in conflict with the statute of 1865 (Gen. Stat. 1865, p. 651, § 8), under which a married woman might have been sued alone in respect to her separate property, and she cannot now be sued alone except when the husband sues her.
3. *Practice, civil—Non-joinder—Error, how reached when not apparent on the face of the proceedings—Amendments—Limitation.*—Where suit is improperly brought against a married woman without joining her husband, and judgment is rendered against her alone, and the error does not appear on the face of the proceedings, the error can only be brought to the attention of the court by a proceeding in the nature of a writ of error *coram nobis*. The usual way is by motion supported by affidavit or evidence. There is no statute of limitations against such a motion; the statute of amendments (Wagn. Stat. 1036, § 19) does not cure this error.

Error to Kansas City Court of Common Pleas.

Twiss & Cook, for plaintiffs in error.

At the next term of the court after judgment Mrs. McNees and her husband, who had not been joined as defendant in this action, appeared and moved to set aside the judgment for the reason that the defendant, Mrs. McNees, was a married woman and could not be sued apart from her husband, for the reason that the suit did not concern her separate estate. This motion was supported by affidavit that the defendant, Margaret A. McNees, had been married for more than twenty years, and lived with her husband and their children at the time of the beginning of the suit and ever since. These facts were not controverted, and appear from the evidence taken at the trial as well as from the affidavit. This motion should have been sustained.

1. This action was commenced in April, 1869, after the act of February 6, 1868, went into effect. By that act it is provided

that "when a married woman is a party her husband must be joined with her in all actions," except when the husband is plaintiff only and the wife defendant only, or when the wife is plaintiff and the husband defendant; that is, except only in actions between husband and wife; and the second section repeals all acts and parts of acts in conflict with this provision. (Sess. Acts 1868, p. 87; Wagn. Stat. 1001, § 8.)

2. This statute is not inconsistent with the mechanics' lien law.

(*a*) By that law an action is given against a married woman. (Gen. Stat. 1865, p. 768, § 8.) But it is expressly provided that the pleadings, practice, process and other proceedings shall be the same as in other civil actions, except as otherwise provided in the lien law itself. (Gen. Stat. 1865, p. 767, § 8.)

(*b*) By that law it is also provided that the parties to the contract shall, and all other persons interested may, be made parties, etc. (Gen. Stat. 1865, p. 767, § 9.) The act of 1868, passed subsequently, enacts that "in all actions" where the wife is a party the husband must be joined with her, and repeals all inconsistent laws. The proceedings to enforce a mechanic's lien are undoubtedly included in the provisions of the law of 1868, so that where the wife is a party to them her husband must be also.

3. Nor is this defect cured by the statute of *jeofails*.

(*a*) That act does not in any of its terms or provisions meet this case. (Sess. Acts 1867, p. 134; Wagn. Stat. 1036, § 19.)

(*b*) It is not perceived how it could very well meet such a case, as the statute of *jeofails* was passed in 1867, and the law requiring husband and wife to be joined, in 1868.

4. The act of 1868 leaves the matter as at common law, under which a *feme covert* could not be sued without joining her husband, and failure to make him a party was a fatal defect at all stages of the proceedings. (Co. Lit. 132 *b;* 1 Com. Dig. 219; *id.* 64; Marshall v. Rutton, 8 T. R. 545; Beard v. Webb, 2 Bos. & Pul. 93; 1 Bac. Abr. 734.)

5. The non-joinder of the husband could be taken advantage of at common law. (*a*) By plea in abatement. (1 Com. Dig. 64; 1 Tidd's Pr. 635; 1 Chit. Plead. 477.) (*b*) By writ of error *coram nobis* to correct the judgment as erroneous in point

of fact. (1 Chit. Plead. 59; 2 Bac. Abr. 198; Rolles' Abr. 748–759; 2 Tidd's Pr. 1136–7; 2 Tidd's Pr. 1169; Callaway v. Nifong, 1 Mo. 223; Powell v. Gott, 13 Mo. 458; Whittelsey's Mo. Pr. 472, § 383.) (*c*) Under the present practice, a motion to set aside the judgment takes the place of the writ of error *coram nobis* at common law. (Powell v. Gott, 13 Mo. 458; Stacker v. Cooper Circuit Court, 25 Mo. 403.) "But if the judgment is irregular, such as might be recalled by writ of error *coram nobis*, then the court may on motion correct the irregularity."

Ewing & Smith, with *A. A. Tomlinson*, for defendants in error.

The court below did not err in overruling the motion to set aside the judgment for irregularity. It was a motion to amend the judgment, or to set it aside, made after the adjournment of the term at which it was rendered. The judgment was rendered at the June term, 1870, and the motion to set aside at October term, 1870; and the defendants not complying with the statutes in such cases, the court very properly overruled the motion for a review. (Gen. Stat. 1865, p. 681, § 16; *id.*, § 13; 29 Mo. 343.)

ADAMS, Judge, delivered the opinion of the court.

This was an action on a mechanic's lien, brought against Nelson as contractor, and the defendant, Margaret A. McNees, as owner of the property, for materials furnished for the erection of a dwelling-house. Margaret A. McNees defended the action as *feme sole* throughout all the proceedings, including final judgment. Many technical points have been raised by the learned counsel for her, but none of them seem to be of sufficient importance to warrant a reversal of the judgment on account of any alleged error previous to the final judgment.

At the next term after final judgment, John C. McNees, as husband of the said Margaret A. McNees, together with his wife Margaret, appeared and filed a motion to set aside the judgment because the husband had not been joined with the wife, and filed an affidavit that they were husband and wife and had been for

twenty-five years. This motion was overruled, and the husband and wife excepted.

By the practice act, as amended in 1868 (Wagn. Stat. 1001, § 8), it is provided that "when a married woman is a party her husband must be joined with her in all actions except those in which the husband is plaintiff only and the wife defendant only, or the wife plaintiff and the husband defendant." At common law the husband had to be joined in all actions against the wife, and this statute is only declaratory of the common law. The wife is not *sui juris*, and the law requires the husband to be brought before the court to protect her interest. An action under the mechanics' lien law is no exception to this rule. Nor does the statute of amendments cure this error. (Wagn. Stat. 1036, § 19.)

Prior to the act of 1868, above referred to, a married woman might have been sued alone in respect of her separate property, under the statute of 1865 (Gen. Stat. 1865, p. 651, § 8), and if in such case she appeared by attorney, the error was cured by verdict. But the above statute of 1868 is in conflict with the statute of 1865, and she cannot now be sued alone except when the husband sues her.

As this error does not appear upon the face of the proceedings, it can only be brought to the attention of the court by a proceeding in the nature of a writ of error *coram nobis*. The usual way is by motion supported by affidavits or evidence. If the motion is sustained, the husband and wife are allowed to make any defense to the merits they may have, and the case is retried. This motion is allowed at any subsequent term after final judgment. I know of no statute of limitations against such a motion. The statute of limitations in regard to irregularities applies to such as appear on the face of the proceedings, and not to such as are brought before court by evidence *aliunde*, as in this case. (See Powell v. Gott, 13 Mo. 458; *Ex parte* Toney, 11 Mo. 661; Groner v. Smith, 49 Mo. 318; *Ex parte* Page, *id.* 291.)

The judgment must be reversed and the cause remanded, to be proceeded in according to the rulings here laid down. The other judges concur.

THOMAS TUCKER, Defendant in Error, *v.* THE PACIFIC RAILROAD COMPANY, Plaintiff in Error.

1. *Railroads — Damages — Delay — Locomotive, etc.* — In an action against a railroad company for damages, resulting from its delay in forwarding stock, it is no defense that the delay was caused by the lack on the part of the company of proper appliances for transportation.

Error to Cooper Circuit Court.

Draffin & Muir, for defendant in error.

Geo. E. Leighton, for plaintiff in error.

The Boonville branch of the Pacific Railroad extends from Boonville to Tipton, a distance of twenty-six miles. It connects at Tipton with the main line of the road. Bunceton is a station on the branch, about ten miles north of Tipton. On the 13th of December, 1870, Thomas Tucker offered for shipment at Bunceton station five cars of hogs, which it may be conceded defendant agreed to receive and transport. When the train to Boonville passed north the conductor left word that he could not take them, and on the return trip he did not take them to Tipton, the reason assigned being that the hogs were bedded with straw, and that the engine he was using, though ordinarily sufficient for all the usual business of the road, threw fire too much under a heavy load to make it safe to run with so much straw in open cars in the rear of the engine. On arrival at Tipton the division superintendent at Jefferson was informed, an engine was sent extra to Tipton, the hogs of plaintiff brought on an extra train to Tipton, an extra to Jefferson, an extra to St. Louis.

If the defendant had taken the hogs on the regular train, they would have arrived at Tipton, if on time, to connect with a train on the main line whose card time of arrival at St. Louis was one o'clock P. M., December 15th. This train, however, by delays (which the court refused to allow to be explained), did not arrive, in fact, until 4:30 P. M., after the close of the market for the day. The extra train which brought the plaintiff's stock arrived at 11 P. M., ten hours behind the card time of the regular train, and six and a half hours after its arrival, in fact.

ADAMS, Judge, delivered the opinion of the court.

This was an action on a contract of affreightment, whereby the defendant, at the town of Bunceton, received a quantity of hogs belonging to plaintiff on its cars, and agreed to deliver them at St. Louis in a reasonable time. The plaintiff gave evidence conducing to prove that the hogs were not delivered in due time, and that, if the hogs had been delivered in time, they would have brought more in the market by twenty cents on the hundred pounds than when actually delivered, and that by the delay the hogs had shrunk in weight.

The defendant offered to prove that the delay was owing to the fact that they had not on hand at the place of shipment a proper locomotive; that the one that was there was made to burn coal and they were using wood on it, and it would have set the cars on fire if used to move the hogs; and offered to prove that as soon as they could get a proper locomotive to the place, the hogs were moved and delivered at St. Louis. All this evidence, consisting of depositions and oral testimony, was rejected by the court.

The court then instructed the jury, at the instance of the plaintiff, to the effect that when the defendant made the contract and received the hogs it was its duty to have ready the proper machinery, etc., to carry the hogs without unnecessary delay to the place of destination, and that the want of proper machinery was no excuse, and the court refused to give counter instructions asked by the defendant. The court also instructed that the measure of damages was the difference in the price of hogs when they ought to have been delivered and when they were actually delivered at the place of destination, and the shrinkage occasioned by the delay.

The jury found a verdict for the plaintiff, and the defendant filed a motion to set it aside, which was overruled.

I have examined this record with care, and can see no fault in any of the rulings of the Circuit Court. When a common carrier like this railroad company receives freight on board of its cars to forward, it becomes its duty to send it without delay. It was its duty to look to its machinery, to see if it was in proper

condition, before the reception of the freight. After receiving the hogs on its cars and agreeing to send them forward, it was too late to look after machinery. It was the duty of the company to have the necessary machinery in readiness before the reception of the hogs.

Let the judgment be affirmed. The other judges concur.

MILTON BRADLEY *et al.*, Respondents, *v.* WILLIAM P. AMES *et al.*, AND JOHN S. HOMAN, Garnishee, Appellants.

1. *Assignment — Universal consent necessary.* — An assignment for the benefit of creditors is void as to one not consenting to or acquiescing in it.

Appeal from Kansas City Court of Common Pleas.

Dean S. Kelley, for respondents.

WAGNER, Judge, delivered the opinion of the court.

The judgment against the garnishee was undoubtedly correct if it appear that, at the time he sold the goods and purchased the balance of the stock, he was acting without any valid assignment made to him by the firm for the benefit of creditors. It seems that he was temporarily in the possession of the stock, under an arrangement with the attorneys of some of the creditors, until all the creditors could be heard from, consulted and brought to a compromise. The plaintiffs in this case never consented to the arrangement or acquiesced in it in any manner. Upon the trial two papers were offered in evidence by the defendant, one purporting to be an assignment made to him by the firm of Ames & Towle, for the benefit of their creditors, on the condition that their creditors should give him a full discharge from their obligations; and the other was a release from certain creditors, but the plaintiffs were not of the number. Both of these papers were excluded by the court, but there was no exception to the ruling in that respect.

On the record, then, the assignment, so far as the plaintiffs were concerned, was void, and the judgment must necessarily be affirmed. The other judges concur.

JOHN C. McNEES, Plaintiff in Error, *v.* JAMES SWANEY AND JOHN G. HAYDEN, Defendants in Error.

1. *Mortgages and deeds of trust — Mortgage with power of sale — Purchase by mortgagee at his own sale — Equity of redemption.* — The principle is well established that when a power of sale is contained in a mortgage, and a sale made by virtue of such power, and the mortgagee becomes the purchaser, the equity of redemption still subsists and attaches to the property in favor of the mortgagor; and if at such sale the mortgagee acquires the title through the agency of a third person, the title will not be in anywise altered, but the right of the mortgagor will remain the same.
2. *Mortgages and deeds of trust — Conditional sale — Agreement as to time of sale — Equity of redemption.* — Where A., being indebted to B., made a mortgage with power of sale to B. to secure the debt, and at maturity A. was unable to pay, and on account of extraneous circumstances it was considered by both that the matter would be more secure if the mortgaged property was sold and the title vested in B.; and it was thereupon agreed that B., the mortgagee under the power, should sell the premises, and that C. should buy them in, and immediately convey to B., and that A. should have one year in which to pay the debt, and again obtain title to the property, and meanwhile should remain in possession, pay the taxes and have the use of the property; *held*, that the sale was not intended to and did not destroy A.'s equity of redemption. The purchase by C. was, in effect, a purchase by B., and B. therefore, being a purchaser at his own sale, the law gave A. the right to redeem, and the agreement did not in any way impair the respective rights of the parties. Such a transaction had none of the elements of a conditional sale. B. did not stand in the position of a person holding the absolute title and agreeing to convey upon certain conditions. He promised the naked legal title, while the equity was in A.
3. *Mortgages and deeds of trust — Equity of redemption — Estoppel — Silence of party claiming interest.* — Where a party claiming an interest in land lies by for a great number of years and sees it enhanced in value and improved by the labor and expenditures of others, the courts will not listen favorably to his demands; and where the person claiming the interest was a mortgagee of the property, and had acquired the interest by a purchase at his own sale, and there is not such want of diligence in the mortgagor as would work a forfeiture by lapse of time, and the mortgagor has not apprehended that he is in danger of losing his property and has been lulled into security by the representations of the mortgagee, the equity of redemption still continues, and the sale does not vest the absolute title in the mortgagee.

Error to Kansas City Court of Common Pleas.

Sheffield and *Slavens*, for plaintiff in error.

I. The purchase by a mortgagee with power of sale at his own sale, through a third person, does not change the relation of the parties. (Mapps v. Sharpe, 32 Ill. 13; Benham v. Rowe, 2 Cal. 387; Moore v. Titman, 44 Ill. 368; Eaton v. Whiting, 3 Pick. 490; Thornton v. Irwin, 43 Mo. 153.) The mortgagee in such case will still hold the title as security for his debt. The mortgagor's only remedy is a bill to redeem, offering to pay the amount found or admitted to be due. (Goldsmith v. Osborne, 1 Edw. Ch. 560; Schwarz v. Sears, 1 Walk. Ch. 170; Russell v. Southard, 12 How., U. S., 139.)

II. Although a mortgagor may sell and convey his equity of redemption to the mortgagee, if he does so in embarrassed circumstances and under pressure, for a price considerably below its value, the transaction is looked upon with great jealousy. (Baugher v. Merryman, 32 Md. 185; Sheckel v. Hopkins, 2 Md. Ch. 90; Dougherty v. McColgan, 6 Gill & J. 275; Conway v. Alexander, 7 Cranch, 218.)

W. B. Napton, for plaintiff in error.

I. Upon the face of the documentary title, this case stands, under the decision of the court in Thornton v. Irwin, 43 Mo. 153, as still a mortgage, notwithstanding the sale by the mortgagee and the purchase by the mortgagee at that sale, through the interposition of Hayden, the crier. (Howards v. Davis, 6 Tex. 174.)

II. Courts of equity view transactions between mortgagor and mortgagee with distrust, and require the clearest proof of a mutual understanding of the contract, and an entire absence of all imposition on the debtor, the mortgagor. (Baugher v. Merryman, 32 Md. 185; Conway v. Alexander, 7 Cranch, 218.)

M. D. Trefren and *F. M. Black*, for defendants in error.

I. A trustee may purchase the trust property from the *cestui que trust*, and if the purchase is free from fraud it is valid, and not even voidable. A mortgagee, with power of sale, is both

trustee and *cestui que trust*, and may become the purchaser of the mortgaged property, with the consent and approval of the mortgagor. (Medsker v. Swaney, 45 Mo. 274; 6 Tex. 174; 4 Seld. 216; 14 Verm. 272; 5 Ala. 428; 1 Pet. 145; 1 Hill on Mortg. 142.)

II. In determining whether a transaction is a mortgage or a conditional sale, the intention and the understanding of the parties at the time should be ascertained and must control. If a mortgage on the one hand, there must be a debt on the other, capable of being enforced either *in rem* or *in personam*. There must be a debt on the one side and a corresponding obligation to pay on the other. If there is no such continuing indebtedness, and the party have the privilege of refunding if he please, and thereby entitle himself to a reconveyance, the transaction is a conditional sale. (Brant v. Robertson, 16 Mo. 143; Slowey v. McMurray, 27 Mo. 115; Turner v. Kerr, 44 Mo. 431; Robinson v. Cropsey, 2 Edw. Ch. 138; Holmes v. Grant, 8 Paige, 258.) A purchase by a strict trustee of the trust property is valid and not even voidable, when made with the knowledge and consent of the *cestui que trust*. (11 Ga. 77; 10 Ohio, 117; 7 Sm. & M. 410.)

WAGNER, Judge, delivered the opinion of the court.

The real question underlying this case is whether, after the sale of the mortgaged premises, the mortgagor, who is the plaintiff here, still retained the right of redemption. The principle is, I think, well established that when a power of sale is contained in a mortgage, and a sale made by virtue of such power, and the mortgagee becomes the purchaser, the equity of redemption still subsists and attaches to the property in favor of the mortgagor. And if at such sale the mortgagee acquires the title through the agency of a third person, the title will not be in anywise altered, and the rights of the mortgagor will remain the same. It is not disputed that parties have the right to agree upon the terms of a power of sale of mortgaged premises, and where the sale takes place upon such terms as the parties were competent to agree upon, and is faithfully and fairly executed, courts will not interfere. (Dobson v. Racey, 4 Seld. 216; Elliott v. Wood, 45

N. Y. 71.) But there is less danger of oppression and abuse of the creditor in agreeing upon the conditions of the security and the power of sale at the time of giving the mortgage, when the mortgagor is free to act as his interest and judgment prompt, than after the relation of mortgagee and mortgagor has been created, and the debt has become due, as the latter is then in a greater or less degree in the power and at the mercy of the creditor. An examination of all the facts in this case makes it perfectly clear to my mind that the sale of the mortgaged premises was not intended to and did not destroy the equity of redemption in the mortgagor. The country was in an unsettled condition, both of the parties were apprehensive that they would have to leave Kansas City, and in fact they did leave in a short time thereafter; and they labored under the impression that by selling the property and having the title vested in the mortgagee, the matter would be more secure. This was the view entertained by them, which resulted in the arrangement under which the property was sold. McNees, the mortgagor, was unable at that time to pay the debt, and there were no sales of property, and Swaney wanted to be secure. It was then agreed that Swaney, the mortgagee under the power, should sell the premises, that they should be bid in by Hayden at the amount of the principal debt and interest, and that Hayden should immediately convey the same to Swaney; and that McNees should have one year within which to pay off the debt, and again obtain title to the property. A further part of the agreement was that McNees was to remain in possession, pay the taxes and have the use of the property. I have said that one year was the time limited in which McNees was to have the privilege of paying the debt and regaining the title, though upon this point there is a conflict in the testimony; Swaney asserting that the limitation prescribed was one year, and McNees saying that the understanding was that he was to have a reasonable time. The purchase by Hayden at the mortgagee's sale was, in effect, a purchase by Swaney himself. McNees continued in possession by his tenant until, in his absence, Swaney induced the tenant to attorn to him, and thereafter exercised ownership over the property, and finally claimed that it was absolutely his.

About this transaction there were none of the characteristics of a conditional sale. Swaney did not stand in the attitude of a person holding the absolute title, agreeing to convey upon certain conditions, but he possessed the naked legal title, while the equity was in McNees. As Swaney, the mortgagee, purchased at his own sale, the law gave McNees the equity of redemption, and the agreement between the parties did not in any way impair or vary their respective rights.

Now, conceding that the understanding was that McNees was to redeem within one year from the date of the sale, will his neglect to do so cause a forfeiture of his rights? Upon the testimony disclosed here, I think not. Where a party claiming an interest in land lies by for a great number of years, and sees it enhanced in value and improved by the labor and expenditure of others, the courts will not listen favorably to his demands. But it is always proper to consider the situation of the parties and all the surrounding circumstances. Shortly after the sale was made, McNees and Swaney both left Kansas City on account of the war then raging. It is obvious that neither party had an idea at that time that anything could be done with the property. Swaney advised McNees not to try to sell the property to pay the debt, as he could not get anything like its value, and at the same time made assurances that the land was his, and that all he wanted was his money. But before the expiration of the year Swaney deeded this land, together with others, to one Collins, of Indiana; he alleges, however, that the deed was not placed on record till after the year had expired. This deed he says was voluntary, and made "to protect the property from the United States army." When the title was vested in Collins, McNees could not proceed, and Swaney in a short time left his home and stayed in the territories until 1865. After his return home Collins conveyed the property back to him, and at the first term of court thereafter this suit was brought.

Under all these circumstances there was no such want of diligence as would work a forfeiture of McNees' rights on account of lapse of time. We do not think it was competent to bar the equity of redemption by the restriction of one year, and the evi-

dence leaves it doubtful whether any such restriction was ever contemplated or agreed upon by the parties.

The relation of mortgagor and mortgagee existed at the time of the sale and the execution of the deed, and the transaction must be viewed with distrust and scrutinized with rigor before it can be allowed that the equity of redemption was extinguished and converted into an absolute title. In such cases the leaning of the courts is always in favor of holding that the mortgage continues. That McNees did not apprehend that he was in any danger of losing his property, and that he was lulled into security by the representations of Swaney, I think is abundantly shown by the testimony.

Upon the whole case as made by the bill of exceptions, we are still at liberty to hold the equity of redemption as continuing, and to decide that the sale and conveyance did not vest the absolute title in the mortgagee. The judgment must therefore be reversed and the cause remanded, with directions to the court below to enter up a decree in conformity with the stated account agreed upon by the parties. The other judges concur.

THE STATE OF MISSOURI, TO USE OF JACOB LECHTER AND LEWIS MOSMEYER, Plaintiffs in Error, *v.* JOHN SCHAR *et al.*, Defendants in Error.

1. *Constable, bond of, action on — Execution, failure to return.* — In suit on a constable's bond for failure to return an execution, it is sufficient for plaintiff to show that the execution was delivered to defendant; and it is not necessary, in order to make out plaintiff's case, to show the failure to return it.
2. *New trial, motion for — Instructions — Surprise.* — It is no ground for a new trial that appellant was surprised by the giving or refusal of instructions.

Error to Cole Circuit Court.

George T. White, for plaintiffs in error.

Lay & Belch, for defendants in error.

ADAMS, Judge, delivered the opinion of the court.

This was an action on a constable's bond for failure to return an execution. The answer of the sureties was a general denial

of all the allegations. The plaintiff, to maintain his case, read the docket of the justice, which showed a judgment and the issuing of an execution; but there was nothing on the docket, nor any other evidence, to show that the execution was delivered to the constable.

On this evidence the plaintiff asked the court to declare the law to be that if the execution was delivered to the constable it devolved upon the constable to show that it had been duly returned. This instruction was refused, and the court having found for defendants, the plaintiff filed a motion for a new trial, accompanied by the affidavit of his attorney that he was taken by surprise by the decision of the court in refusing his instruction. The motion for a new trial was overruled and judgment given for defendants.

The general rule is that he who alleges an affirmative is bound to prove it. But there are some exceptions to this rule. Where the plaintiff grounds his right of action upon a negative allegation, and the proof of the affirmative is not peculiarly within the knowledge and power of the other party, the establishment of this negative is an essential element of the plaintiff's case. Where, however, the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party. (1 Greenl. Ev., § 79.) This is the case in regard to informations or indictments against persons for keeping a dram-shop without license. The State proves the selling of the liquor, and rests, and the defendant must produce his license. There is some conflict in the authorities on this question, but I think the better rule in such case is that the *onus* is on the defendant to produce his license. (See Schmidt v. The State, 14 Mo. 137; The State v. Morrison, 3 Dev., N. C., 299; Haskill v. The Commonwealth, 3 B. Monr. 342; Geuing v. The State, 1 McCord, 573; Shearer v. The State, 7 Blackf., Ind., 99; Turner's case, 5 Maule & S. 206; Apothecaries' Co. v. Bently, 1 Carr. & P. 538.)

I see no material difference between the case of a license and an execution. If you prove that an execution was delivered to a constable or a sheriff, to be executed by him, he ought to account for it. What was done by him with the execution, is within his

peculiar knowledge. If he still has the execution he can produce it. If he has returned it he has access to the files, and can protect himself by his return on the execution. This was the doctrine as declared by this court in The State, etc., v. Melton *et al.*, 8 Mo. 417, and we see no reason to change the rule. In the case under consideration there was no proof that the execution was ever delivered to the constable, and for this reason the instruction was rightly refused.

The affidavit filed with the motion for a new trial affords no grounds for setting aside the verdict. The giving or refusing of instructions cannot operate as a surprise. If they are not the law, the party has his remedy by appeal or writ of error. If they are the law, the party is not injured, and there could be no surprise, as he or his counsel should have made themselves acquainted with all the law of his case.

Judgment affirmed. The other judges concur.

SAMUEL MCCARTNEY *et al.*, Plaintiffs in Error, *v.* JOHN A. AUER, Defendant in Error.

1. *Landlord and tenant — Attornment by tenant to a stranger void — Right of re-entry and ouster — Evidence.* — Under the statute (Wagn. Stat. 879, §§ 10–11), where a tenant for a term not exceeding two years in possession, without the landlord's consent, delivered the key of the premises to a party other than the landlord, and afterwards accepted the key and continued in possession as tenant of a stranger, the landlord was entitled, after giving ten days' notice, to institute proceedings to regain possession; and under such proceedings the landlord has a right to prove the giving of such notice.
2. *Practice, civil — Justices' courts — Statement of cause of action — Forcible entry and detainer — Evidence.* — Strictness of averments and technical precision in pleading is not required in magistrates' courts. When there is an allegation of forcible entry the complainant shall not be required to make further proof of the forcible entry than that he was lawfully possessed of the premises, and that the defendant unlawfully enter into and detained, or unlawfully detained, the same. (Wagn. Stat. 645, § 16.)

Error to Kansas City Court of Common Pleas.

W. Hough, for plaintiffs in error.

Although the complaint in this cause may be said to be, under a strict construction of its language, for a forcible entry and a

forcible detainer, yet, whether the entry be with or without force, the detainer is unlawful whether maintained with or without force; and the proof, to maintain an action under either section 2 or 3 of chapter 61, Wagner's Statutes, is, under section 16 of that chapter, p. 645, the same. (Wunsch v. Gretel, 26 Mo. 580.) The attornment by Threlkeld to Brown, without the consent of his landlord, was void, and Threlkeld still remained tenant of the plaintiffs. (Rutherford v. Ullman, 42 Mo 216.) The testimony of William Douglas to prove a demand by the plaintiffs, for the possession of the premises from Auer, after the expiration of Threlkeld's term, was admissible. (Reed v. Bell, 26 Mo. 218; Wagn. Stat. 879, §§ 10, 11.)

Tichenor & Warner and *Brown & Case*, for defendants in error.

I. This is an action of forcible entry and detainer by plaintiffs, who were in possession, not actually, but by their tenant, Threlkeld; if so, tenant must bring this action and not his landlord. (Burns v. Patrick, 27 Mo. 435; McCartney's Adm'r v. Alderson, 45 Mo. 35.)

II. Defendant, by plaintiff's evidence, came in by invitation of plaintiff's tenant, and on payment to him of $300; hence there was but one way for plaintiffs to proceed to get possession, and that was, not by the forcible entry and detainer act, but by the landlord and tenant act. (Wagn. Stat. 879, §§ 10, 11; Reed v. Bell, 26 Mo. 217.)

III. The court committed no error in excluding evidence of demand in writing for possession. The complaint is such, if true, that none was necessary. (Burns v. Patrick, *supra;* Wagn. Stat. 642, § 3.)

WAGNER, Judge, delivered the opinion of the court.

This suit was brought before a justice of the peace to recover possession of certain premises in Kansas City. At the trial before the justice the defendant had judgment. The case was then appealed to the Court of Common Pleas, and after hearing the testimony the court gave an instruction that, upon the evi-

dence, the plaintiffs could not recover. A nonsuit was then taken, and after an unavailing motion to set the same aside, a writ of error was sued out. The evidence adduced at the trial shows that the plaintiffs were in possession of the premises by their tenant, and while the tenant was so in possession he delivered up the key of the storehouse to another party, and then accepted the key back as the tenant of one P. S. Brown, under an arrangement made with Brown. A short time after this arrangement, in consideration of $300 paid him by the defendant, the tenant, who had continued in the occupancy all the time, delivered the possession to the defendant, who still retained the possession at the commencement of this suit.

This attornment by the tenant was not made with the assent of the plaintiffs, nor in pursuance of any provision of law on the subject. The attornment was void and did not in the least affect the possession of the landlords. (Wagn. Stat. 880, § 15; Rutherford v. Ullman, 42 Mo. 216.)

The statute provides that no tenant for a term not exceeding two years (and here the tenancy was yearly) or at will, or by sufferance, shall assign or transfer his term or interest, or any part thereof, to another, without the written assent of the landlord or person holding under him; and that if any tenant violate the above provisions, the landlord or the person holding under him, after giving ten days' notice to quit possession, shall have a right to re-enter the premises and take possession thereof, or to oust the tenant, sub-tenant or under-tenant, by the proper procedure. (Wagn. Stat. 879, §§ 10, 11.) When, therefore, the illegal attornment was made, upon giving the requisite notice, the plaintiffs had the right to institute proceedings to regain possession. The plaintiffs attempted to prove that they gave the necessary notice, and it was ruled out by the court, wrongfully as I think.

The complaint in this case charges the defendant with forcible entry and detainer. It is obvious that there was no forcible entry, but there was unlawful detainer. Strictness of averments and technical precision in pleadings is not required in magistrates' courts. The statement may have used words not strictly appli-

cable to the case, but the statute declares that where there is an allegation of forcible entry "the complainant shall not be compelled to make further proof of the forcible entry or detainer than that he was lawfully possessed of the premises, and that the defendant unlawfully entered into and detained, or unlawfully detained, the same." (Wagn. Stat. 645, § 16; also Wunsch v. Gretel, 26 Mo. 580.)

The plaintiffs' testimony tended to prove an unlawful entry and an unlawful detainer, and I think the court erred in its instruction taking the case from the jury. The judgment will therefore be reversed and the cause remanded. The other judges concur.

STEPHEN P. TWISS, Defendant in Error, *v.* CHARLES G. HOPKINS *et al.*, Plaintiffs in Error.

1. *Practice, civil — Appeal — Supreme Court will not review a case which turns only on weight of evidence.* — In a law case, where, on the trial in the court below, no exceptions are taken and no instructions asked or given, and the case turns merely on weight of evidence, there is nothing for the Supreme Court to review, and judgment will be affirmed.

Error to Kansas City Court of Common Pleas.

Twiss & Cook, for defendant in error.

J. Brown Hovey, for plaintiffs in error.

WAGNER, Judge, delivered the opinion of the court.

This action was founded on a promissory note, and the answer contained two counts: first, a denial of the execution of the note; and, second, a want of consideration. The cause was submitted to the court sitting as a jury, by agreement of the parties. Verdict and judgment for plaintiff.

At the trial no exception was taken to the ruling of the court, no instructions were asked or given, and there is no point of law saved. The merits turned entirely on the weight of evidence, and there is nothing for this court to review.

Judgment affirmed. The other judges concur.

WILLIAM HOLMES, ADMINISTRATOR OF ESTATE OF ROBERT SIMMERWELL, Respondent, *v.* JOHNSON LYKINS, Appellant.

1. *Bills and notes — Collateral security — Offset.* — A note given for collection, and the amount of which, when collected, was to be credited upon another note and held as an offset thereto, is merely a collateral security for the payment of the note last named, and not to be treated as payment of the same before the amount is actually collected. And where judgment on the collateral note is turned over to the maker of the principal one, and he gets the benefit of it, he is afterwards estopped from setting up such an offset.

Appeal from Kansas City Court of Common Pleas.

Gage & Ladd, for appellant.

The note transferred by defendant to Simmerwell operated as a conditional payment upon the note sued on, and stands as payment until returned or accounted for. (Dayton v. Trull, 23 Wend. 345–6; Kearslake v. Morgan, 5 T. R. 513; Chit. Bills, 97.)

F. M. Black, for respondent.

The first note was no payment of the note sued upon. (Appleton v. Kennon, 19 Mo. 637.) By the terms of the receipt given by Simmerwell to defendant, it was only taken as collateral security. (1 Smith Lead. Cas., 5th Am. ed., 452.) A creditor who accepts a note, either as collateral security or conditional payment, is only bound to use due diligence in collecting. He is not bound to bring suit. (Smith Lead. Cas. 452; Roberts v. Thompson, 14 Ohio St. 1.) The acceptance of such security does not prevent the holder from proceeding on the assigned debt. He may pursue both at the same time. (1 Smith's Lead. Cas. 452; Taylor v. Cheever, 6 Gray, 146; Granite Bank v. Richardson, 7 Metc. 408.)

ADAMS, Judge, delivered the opinion of the court.

This was an action on a note executed by the defendant to plaintiff's intestate. The defendant, by way of counter-claim, set up as a credit the amount of a note which he had transferred to the intestate, and for which he took the following receipt.

"Received, November 25, 1861, of J. Lykins, one note, signed by John P. Wood, William R. Lykins, G. W. Hutcheson and Joel Groener, trustees of the town of Lawrence, for one thousand dollars, which I am to collect of said trustees with interest, and which, when collected, is to be credited on a certain note which I hold against the said J. Lykins, and is to be an offset to said note.

ROBERT SIMMERWELL."

The evidence showed that suit had been brought on this note in the State of Kansas, where the payers resided, and judgment obtained, and that defendant had assumed control of this judgment as his property. Under executions issued on this judgment, property had been bought in the name of the defendant in payment of the judgment, which he assumed to sell, etc.

The case was submitted to a jury, and the court, in substance, declared the law to be that the defendant was not, under the circumstances detailed in evidence, entitled to a credit for the amount of the note set up in his answer as a counter-claim or credit. The jury found for the plaintiff for the whole amount of the note sued on.

It is very clear from the language of the receipt given for the trustees' note that it was taken only as collateral security, and the proceeds, when collected, were to be an offset to the note sued on. It was not taken as an absolute payment, nor was there to be any credit until the money was realized out of the note.

It is not pretended that the defendant suffered any loss or damage by any neglect on the part of plaintiff's intestate. In fact, it appears from the evidence that judgment was obtained upon the trustees' note, and that this judgment was transferred to the defendant.

After purchasing property and receiving the benefit of it as payment on this judgment, the defendant is estopped from setting up the amount of the note as a credit in this suit.

Let the judgment be affirmed. The other judges concur.

C. M. Ward, Respondent, *v.* County Court of Cole County, Appellant.

1. *Circuit Court, record of — Index, compensation for making* — Mandamus. — In 1869 the Circuit Court of Cole county had no authority to order the making of an index of the records of the court; and even if it had the authority, it had no power to fix the compensation for such services. The County Court is the proper tribunal to adjudicate that question in the first instance. Hence, claimant having another remedy, *mandamus* will not lie to compel the County Court to audit the claim for payment simply on the strength of such order.

Appeal from Cole Circuit Court.

E. L. Edwards & Son, for appellant.

Ewing & Smith and *Geo. T. White*, for respondent.

Bliss, Judge, delivered the opinion of the court.

In February, 1869, the relator was ordered by the Circuit Court of Cole county to make an index of the records of said court, which labor he performed. He presented to the court his account for the work, amounting to a little over $1,000, which was allowed, and the allowance certified to the County Court. The latter court refused to audit the account, and the relator sued out a writ of *mandamus* from said Circuit Court, which was made peremptory.

The substantial questions are: first, whether the Circuit Court had the right to make the order; second, whether it could fix the compensation; and, third, whether *mandamus* would lie.

1. I find no authority at that time to make the order. On the 14th of March, 1870, by an amendatory act concerning indexing records (Sess. Acts 1870, p. 49), the several courts of the State are authorized to procure, if needed, new indexes, but no express power existed as to the Circuit Court records previous to that time. The act of March 2, 1867 (Sess. Acts 1867, p. 108), was confined to the records of the County and Probate Courts. Counsel claim the authority from section 14 of the act concerning courts, etc. (Wagn. Stat. 420), which requires the judges of the several courts to examine and superintend their records, to

require that the several dockets "and all indexes to the records be correctly made out at the proper time," etc. This section imposes a very important duty upon the judges, but gives no authority to order new indexes to old records. It refers to the current duties of the clerk, and the judges should see at every term that they are thoroughly performed.

2. Even if the Circuit Court had power to direct new indexes to be made, it has no power to fix the compensation. The act of 1867, above referred to as amended, still leaves the compensation to be audited and paid by the County Court; and if there were no provisions on the subject, the County Court, by virtue of its general powers and duties in regard to claims against the county, is the proper body to which the claim for compensation should be presented. If this be so, then,

3. *Mandamus* will not lie. If the Circuit Court, by its order, had authority to fix the compensation, so as to make the duty of the County Court imperative, giving the allowance the force of a judgment, then no discretion would be left, the whole matter would have been adjudicated, and the latter could be required by this writ to provide for its payment. But no such power being given the Circuit Court, the claim, if it exists, is an ordinary one, to vindicate which the claimant has a specific remedy. He may present it to the County Court, and appeal if not satisfied with their action, or he may bring his action. Having these remedies, he is not entitled to a writ of *mandamus*. (See Mansfield *et al.* v. Fuller *at al.*, *ante*, p. 338.)

The judgment will be reversed and the petition dismissed. The other judges concur.

[END OF JULY TERM.]